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PLEA OF INSANITY IN CRIMINAL CASES.

In our last number but one, we directed the attention of our readers to the very unsettled condition of the law on the subject of insanity as an excuse for criminal acts, and especially to the recent signal failure of the English judges to remedy its defects, by determining, beyond the reach of mistake or misunderstanding, the correct principles of responsibility. We undertook to show that these principles are in conflict with one another, unsupported by the known phenomena of insanity, and calculated, in practice, to work much injustice and suffering. The fact that on this subject, we are but little in advance of the seventeenth century, is discreditable to the humanity and science of the age, and deserves our most serious consideration. We believe it has mainly arisen from popular errors respecting the nature of insanity having been made the foundation of legal principles, and we now propose to subject these errors to a faithful examination. In doing this, however, we profess to state nothing new. Our only hope is to convince, if possible, some impartial minds, of the truth of facts that have long since been established among men who have a professional and practical acquaintance with mental disease.

There is probably no erroneous principle on this subject, so

plausible or prevalent, as that which admits the plea of insanity only in regard to acts that are the immediate and manifest offspring of delusion. Our objection lies against the correctness of the implied fact which is too readily taken for granted, or at any rate, against the validity of any evidence by which it can possibly be supported. Is it true that the insane judge of their relations to persons and things not immediately connected with their delusions, with ordinary clearness and accuracy? Does the cloud that settles over one portion of their mental horizon, throw no shadow over the rest of it? This question involves a matter of fact, and must be decided solely on the testimony of those who have had abundant opportunities of observing the insane, of learning their habits, their modes of thinking and feeling, their motives and impulses. It is unquestionably true that a person partially insane may, to a certain extent, be quite rational in his conduct and conversation, but the same is equally true of those who are regarded as wholly insane. Let a stranger spend an hour or two in the galleries of an asylum, observing the manners of the inmates, and watching them while engaged in their labors, amusements and conversation, and distinguish, if he can, the wholly from the partially insane. If this limited power of speaking and acting correctly does not invalidate the plea of insanity as it regards the one class, why should it as it regards the other? Touching this phenomenon there are two facts which should be duly considered, in forming our opinion of its relation to legal responsibility. In the first place, this apparent rationality of the insane is usually manifested in connection with matters, to them of secondary consequence, not calculated to excite much interest, nor to task any moral or intellectual faculty, but the moment their attention is engaged with topics of an opposite character, we perceive the influence of disease. A word, a look, by some bond of association, may touch a discordant string, and this individual, before so calm, so cool and rational, launches into a strain of absurdities, or explodes in a storm of passion. While the sea is smooth and the winds light, reason easily guides the helm which is wrenched from its grasp by the first breeze that ruffles the surface. The transition from the apparently sane to the insane, is perfectly obvious when we see the exciting cause, and the patient gives audible expression to his thoughts. But because we do not learn these intermediate steps, as they often are not manifested by any sensible marks, does it follow that the final act to which they lead, is entirely free from the taint of insanity? This is undoubtedly possible, but since we can never prove the fact, and the other event is highly probable, we are bound to abide by the known gen-

eral rule and not the doubtful exception. The more one sees of mental disorder, the more, we apprehend, is he disposed to believe that this integrity of some of the functions in partial insanity, is rather apparent than real, — that the disease, however limited, seldom if ever, fails to irradiate its morbific influence to a greater or less extent. A little acquaintance with monomaniacs almost always brings to light certain peculiarities in their modes of thinking or acting, or certain inequalities of temper which they did not manifest previous to their disease. So latent is this effect sometimes, that it will evade the closest observation, until a suitable opportunity occurs for its development. In this respect, it seems to follow a common law of our mental constitution whose faculties require a certain combination of circumstances to arouse them into activity and develop them in all their energy and power. How often do we find patients who, while enjoying the quiet, seclusion and kindness of an asylum, are correct in their deportment, circumspect in their ways, punctual in their outgoings and incomings, courteous and obliging in their manners; but, restored to the bosom of their families, become overbearing, contentious and irascible, destroying the peace and threatening the lives of those who should be most dear to them. In most monomaniacs — so far indeed as our experience goes, the fact is without an exception — we see, as it regards their estimates of men and things, less intellectual discernment and a lower tone of moral feeling than they manifested in their sound and healthy condition. Who that has been much conversant with the insane, has not been surprised at times, to hear persons who have always talked sensibly and discreetly except on their weak points, unexpectedly giving utterance to sentiments that betray a radical perversion of their moral perceptions? Is all this to go for nothing in settling the measure of their legal responsibility?

The other fact to which we alluded, as important to be considered in this connection, is, that much of the ordinary working of the mind, whether sane or insane, becomes somewhat instinctive and mechanical, and goes on, if not entirely independent of the exercise of the reasoning powers, certainly without their close and active supervision. In hospitals for the insane, this phenomenon is sometimes witnessed in a very remarkable degree. There we see men whose understandings are a complete wreck, every day uttering certain mere common-places of conversation, performing certain acts, and continuing certain habits which to a stranger would convey the impression that their mental disorder is very partial in its operation. How often do we see patients in that state of fatuity which is the

sequel of long-continued insanity, playing at draughts, or performing on some musical instrument with a very creditable degree of skill. In accordance, therefore, with this law of our intellectual being, an insane person may appear quite rational in some respects, simply because his *understanding* has nothing to do with it. He thinks and acts mechanically. But let him be tried on something that requires a fresh and active exercise of thought; something that requires control of his feelings, and then we shall see how feeble is the dominion of reason. It would be strange indeed, contrary to all our analogies of morbid action, if a disease so serious as to completely distort the perceptions and pervert the evidence of the senses, on some points, should leave all the other mental operations perfectly intact. The testimony of experience does not render it probable that, to a person believing himself to be the prophet Elijah, or the Savior of the world, every person and thing not apparently connected with this belief, would appear in their usual unclouded aspect.

There is a fact in the psychology of insanity that should render us exceedingly cautious how we attribute responsibility to the insane. The ordinary observer is apt to be misled as to the real condition of the mind, by a certain air of collectedness and self-control which they often manifest, even when quite unconscious of what they are about. There is every reason to believe that in many, if not all cases of this disease, the mental operations are strictly analogous to those of dreaming, and that the individual lives as in a waking dream, or, to use an apter illustration, like a somnambulist. Like the latter he may discharge some of his duties with accustomed skill and discretion, and like him too, he may wake from his walking dream, unconscious of much, if not everything, he has said and done. On recovery, patients frequently look back upon the period of their disorder, as upon a troubled sleep, and describe their thoughts and impressions, very much as one relates the incidents of a dream. This fact is not confined to such as are considered wholly insane, but is often witnessed in those who are supposed to be monomaniacs only, and who have, apparently, lost none of their natural shrewdness and self-control upon any subject not connected with their delusion. We have met with some remarkable cases of this kind, which we would mention, were not the general fact admitted by all who are conversant with the insane. Indeed, it is obvious to the most superficial observer, that in insanity, the thoughts follow the same laws of association which regulate their succession in sleep. In the one as in the other, they succeed one another, divested of their ordinary relations to times, circumstances,

and facts; the imagination runs into unhallowed paths, and perceptions from within and without are strangely confounded and mingled together.

We would not, however, have it supposed, that we regard any and every degree of insanity as necessarily tainting any and every act of the patient, and destroying his legal competency altogether. Insanity is not equivalent to incompetency. The doctrine we maintain is simply this, that the legal consequences of insanity should be determined by the circumstances of the particular act in question, and not by any abstract rule. This thing is certain, that justice requires a complete inversion of the present relation which insanity bears to incompetency in civil and criminal cases respectively. While in the former, the law is inclined to see incompetency in all insanity, and in the latter, no incompetency at all in a great deal of unquestionable insanity; we, on the contrary, would consult the welfare of the insane in the latter class of cases, by giving them the benefit of every reasonable doubt, and in the former would jealously guard their interests, though not at the expense of the sane who may have occasion to deal with them.

From the terms used to define legal accountability, it might be fairly inferred that the false and absurd ideas of the insane, are as definite, as precise, and as clearly perceived and understood by themselves and others, as those of the sane. Nothing can be farther from the truth. Such notions are characteristically vague, indefinite, not clearly perceived, nor thoroughly understood. From want of sufficient steadiness or concentration of mind, or both, they find it difficult to express or explain their ideas, and for a similar reason probably, they are singularly unstable and changing in their views. They may utter certain propositions and may give their assent to others, but can we believe that, laboring under the deficiencies here indicated, their perceptions have that degree of clearness and accuracy which is essential to the idea of understanding and knowledge? The law asks whether the party knew that the act he committed was wrong, or contrary to law, &c. implying that the reflective powers of such a person are not essentially changed, but only conduct to unsound conclusions. The fact is, however, that seldom, if ever, do the insane, before committing acts of violence, reflect calmly on the subject, view it in its different relations, and thus deliberately form the simple, intelligible conclusion, that the act they meditate, is right. The notions which flit through their mind are too vague and disjointed to be properly called *knowledge*, although they may use that term, themselves in speaking of their views. Were it otherwise, why should they, on

recovery, regard the whole aspect of the subject in a very different light, and be as much astonished as others to find what they have said and done? It appears to them, as we have said above — and the fact cannot be too strongly impressed upon us — like a revery or dream of which they have but a few indistinct and scattered recollections.

Another most serious mistake of legal authorities, is that of regarding the deranging effects of insanity as confined to the intellectual faculties, entirely overlooking the moral sentiments. That the latter, as well as the former, are connected with the brain as their material instrument, and are equally liable to be deranged by insanity, are propositions that no one with any professional knowledge of the subject, thinks of doubting. On the contrary, it has long been observed, that the derangement of the moral faculties is a more constant phenomenon of insanity than that of the intellectual. In most cases there is evinced some moral obliquity quite unnatural to the individual, a loss of his ordinary interest in the relations of father, son, husband or brother, long before a single word escapes from his lips, "sounding to folly." Through the course of the disease, the moral and intellectual impairments proceed together, *pari passu*, while the return of the affections to their natural channels is one of the strongest indications of approaching recovery. In a certain class of cases the moral impairment constitutes the whole aberration, being unaccompanied by any intellectual disorder; or most strictly speaking, if there is any such — and there probably is in every case — it is too slight to be readily discerned. This form of mental disorder is analogous to that state of mind which is produced by a slight degree of intoxication, where the moral perceptions are blunted, and a rose-colored light thrown over the views and projects, while the tongue gives utterance to no word of incoherence or folly. These cases often present us with a complete inversion of the natural relations of the mind to good and evil. We once asked a patient who was constantly doing or saying something to annoy or disturb those around him, while his intellect was as free from delusion, or any other impairment, to all appearance, as ever, whether in committing his aggressive acts, he felt constrained by an irresistible impulse contrary to his convictions of right, or was not aware, at the time, that he was doing wrong. His reply was full of meaning, and should sink deep into the minds of those who legislate for the insane. "I neither acted from an irresistible impulse, nor upon the belief that I was doing right. I knew perfectly well I was doing wrong, and I might have refrained if I had pleased. I did thus and so because I *loved* to do it. It

gave me an indescribable pleasure to do wrong." Yet this man when well, is kind and benevolent, and in his whole walk and conversation, a model of propriety. Now, in the legal tests of responsibility, reference is made exclusively to the *knowing* powers, as if the *affective* had no existence, or were never touched by insanity. This, certainly, is acting the play with the part of Hamlet left out. We would gladly dwell longer on this form of mental disorder so interesting to the medical jurist, were it not incompatible with the limits we have assigned to ourselves on this occasion. It is enough for our purpose to call attention to a couple of undeniable facts; viz. that the moral or affective faculties are generally, and often exclusively impaired in insanity; and that in the tests of responsibility that have guided the decisions of courts, no reference is made to this phenomenon.

In view then of all these serious objections to any psychological test of responsibility, we would propose one of a very different character and assuming nothing that is not practically true, — one which has been recommended by legislators and jurists and adopted into the codes of several countries. We would have it then a part of the law of the land, *that insanity without stint or qualification should annul responsibility for criminal acts*, and that the question to be submitted to the jury should be, not whether the accused knew right from wrong, &c. but *whether he was insane when he committed the act.* This is the provision of the code of France which declares that "there is no crime nor offence when the accused was in a state of madness at the time of the act." In the penal code that Mr. Livingston offered to the state of Louisiana, it is provided that, "no act done by a person in a state of insanity can be punished as an offence." The revised statutes of New York contain the same provision in the same words. The revised statutes of Arkansas provide "that a lunatic or insane person, without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged."

If we are asked whether an insane person may not commit a really criminal act, that is, one which in him has all the elements of crime, we would simply reply, that while the present state of our knowledge would not warrant us in denying the possibility of the fact, it equally prevents us from admitting the possibility of proving it. Whoever will venture to say that any criminal act could not by any possibility have sprung from, or been connected with an insane delusion, which it is admitted that the party entertained, can know but little of the workings of insanity. There is a radical error at the bottom of the ordinary reasoning on this point. What can be

more grossly erroneous than to undertake to connect the ideas and acts of an insane mind, by means of the same laws of association that exist in the sane mind? This error, we have already endeavored to expose, and therefore, unless we are mistaken in regard to it, there must be some other means than the ordinary laws of association, for tracing the connection between the criminal act and the delusion. But what shall it be? What will enable us to gather up the broken links of that golden chain which disease has shattered into fragments, and present a complete, continuous whole? In cases where there is no specific delusion, the difficulty is increased, if possible, of proving that the act is not the offspring of insanity, however slight may have been the indications of disease. Will any one furnish us a clew that shall guide us safely through the cloud of confusion that has settled down upon such a mind? Books on insanity and the experience of those who have had charge of the insane, abound with cases where acts of violence were committed by patients who could give no other account of the matter than that they were urged by a sudden impulse which they could neither understand nor explain.

Let it not be said, that we would grant an unreasonable indulgence to the outbreakings of unbridled passion, and seek to engraft strange and unheard of principles upon the criminal law. We ask for no more indulgence than has been repeatedly shown in England in the class of cases in question, but we would have the practice uniform and consistent, which it is far from being now to a deplorable extent. The correctness of the principle we are advocating is virtually admitted in civil cases. The law is in one way or another ready to invalidate the civil acts of the insane, even when the mental disorder is of a very limited description. Here there is no straining after theoretical distinctions, no hair-splitting or metaphysical subtleties. It is enough that the party's mind is confessedly impaired, to warrant us in protecting him against the consequences of his own unreasonable acts. The will of a person whose mental faculties were ever so slightly affected, would be invalidated upon evidence of the least improper influence upon his mind. The contracts of such persons are also viewed with the same kind of jealousy. Indeed this distrust of the competency of the insane is sometimes carried beyond the requirements of justice. In a criminal prosecution in one of the courts of Maine, a few years since, a person who was the aggrieved party and the principal witness of the government, testified that he had been shot at by the prisoner. His manner was calm and collected, the facts which he related were generally understood to be true, and some of them

were corroborated by other witnesses. On admitting, however, that he believed himself to be the Savior of the world, his evidence was rejected, the prosecution was abandoned, and the ends of justice were thus signally defeated. Had this person, on the contrary, been the prisoner arraigned on a charge of murder, how differently would the question of his competency have been dealt with. The jury would probably have been told that partial insanity does not necessarily excuse a criminal act, and that if they believed he was aware at the time that he was acting contrary to law, or knew that he was doing wrong in that particular case, or had inflicted a degree of retaliation altogether disproportioned to the offence, then they were bound to convict him. Can any one tell us on what ground this remarkable distinction is founded? Is insanity a different thing in criminal cases from what it is in civil? Does justice mean one thing in matters of property, and quite another thing, in a matter of life?

We would not object to qualify the exculpatory effects of insanity as expressed in the French penal code and Livingston's, by appending the following condition, viz.; *unless the criminal act can be proved to have no connection with the insanity of the party*, thus throwing the burden of proof on the government, were we sure that the spirit of the law would be faithfully observed. We have but little doubt, however, that it would not prevent the introduction of the present psychological tests, and thus the objects of the law would be defeated altogether. If the court could say to the jury, "the prisoner's insanity is admitted by the government, and he is entitled to his acquittal on this ground, unless you can satisfy yourselves that the act had no connection with the mental disease," it might also regard it as a part of its duty to instruct them how they could be satisfied on this point, and add "that if they believed that the prisoner knew he was doing wrong, &c. they would be warranted in inferring that his insanity had no connection with the act, and could not render him irresponsible." We should therefore prefer the simple expressions of Livingston's code, and some special provision might be needed to guard even these from the intrusion of the psychological tests, so strong is the influence of the common law in judicial decisions. No better proof of this can be needed than the fact, that in defiance of the statute of New York, quoted above, the courts have repeatedly instructed the jury in the principles of the common law. In the trial of Kleim, last spring, in the city of New York, for the murder of his wife, the court, through Mr. Justice Edmonds, stated that "the inquiry for the jury was whether the prisoner was an 'insane person.'" And yet a

moment afterwards, it holds the following language: "The inquiry now to be made under the rule of law as now established, [the common law] was as to the prisoner's knowledge of right and wrong at the time of committing the offence." "To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." Here it is obviously implied that there is an insanity that does not annul criminal responsibility, but the statute conveys no such idea. It may possibly be alleged that it was the right and the duty of the court to define insanity and instruct the jury as to the meaning of the legislature regarding it. This no one would dispute, but something very different was done in the case before us. The court did not undertake to define insanity in contradistinction from sanity, but to distinguish that kind of insanity which annuls responsibility, from such as do not have this effect. In so doing, we cannot help thinking that the court transcended its authority, for if the legislature had not intended to supersede the common law, we cannot conceive what purpose was answered by a statute on the subject.[1]

In the "opinion of the supreme court of New York in the case of William Freeman," brought into it by writ of error from the court of oyer and terminer, and which may be found in our number for May last, the supremacy of the common law over the statute is also explicitly maintained. The court by Chief Justice Beardsley, says that the statute was "not intended to abrogate or qualify the common law rule," although it admits that, at first blush, the clause in question, (which we have mentioned as being identical with one in Livingston's Code,) "might seem to exempt from punishment every act done by a person who is insane *upon any subject whatever*." "I interpret it," adds the court, "as if the words had been 'no act done by a person in a state of insanity,' *in respect to such act*, 'can be punished as an offence.'" Its only reasons for adhering to the common law rule are, that a literal interpretation of the statute "would be a mighty change in the law," and has not been adopted by any judicial tribunal during the sixteen

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[1] American Journal of Insanity, Vol. II. No. 3.

We hope the drift of the above remarks on Judge Edmonds's charge, will not be misunderstood. Considered as an exposition of the common law, it is all that the friends of humanity could desire, and were it always to find expositors enlightened enough to prefer the knowledge of the present to the ignorance of the past, we would ask for no statutory provisions. When made, however, are we unreasonable in requiring that they should be implicitly observed?

years since the statute was enacted. In this view of the matter, the statute becomes a mere pleonasm, an empty recognition of what was already universally admitted. Is this the fact?

Although not particularly connected with this point, yet we cannot forego the opportunity to express our surprise at the manner in which the court deals with one of the consequences of the use of a metaphysical test of responsibility. The inferior court, it seems, in its instructions to the jury, had said, "the main question with the jury was to decide whether the prisoner knew right from wrong. If he did, then he was to be considered sane." [This trial was a preliminary one of the mental condition of the prisoner who had been indicted for murder.] Accordingly, the jury found that "he was sufficiently sane in mind and memory, to distinguish between right and wrong." "This verdict," says the supreme court, "was defective. It did not directly find anything, and certainly not the point in issue, but evaded it by an argumentative finding." Technically, no doubt, this verdict was defective, but it certainly was not an evasion of the point at issue as stated by the inferior court. The fault lay with the court, not the jury. Indeed the court regarded the verdict as settling the question of insanity, even in the subsequent trial on the main issue, though one of the jurors declared that it was very far from his intention to express the opinion that the prisoner was not insane. The case stands then somewhat thus; the inferior court receives the verdict as affirmatory of the prisoner's sanity; the jury, or one of them at least, say it means a very different thing; and the game of cross purposes is finished by the supreme court virtually saying that it means just nothing at all. There appears to be a discrepancy between the view taken by the supreme court respecting the verdict of the jury, and that which guided its own decision. It says, the issue required the jury to find that the prisoner was or was not insane; in accordance, we suppose, with the first clause of the statute which declares that "no insane person can be tried, sentenced to any punishment, or punished for any crime or offence while he continues in that state." If such were the duty of the jury, it follows that the judge should have presented to them the naked issue, sanity or insanity. But if the judge were bound to follow the language of the statute on the trial of the preliminary issue, why not on the trial of the main issue? The words used in the two clauses to designate the mental affection, are the same. Can we have any stronger illustration of the necessity of a statutory provision, and one that shall be faithfully observed by courts?

A very serious evil in the administration of the criminal law in

cases where insanity is pleaded in defence, is the absence of any legal provision for satisfactorily establishing or disproving its existence. The matter is left entirely to the counsel who use such means as they please and the law permits. They summon only such witnesses as suit their purposes, and medical men can generally be found — we regret to say it — ready to testify for or against the insanity of the accused, who have had but little practical knowledge of the disease, and have made but a superficial examination of the case in hand. Witnesses summoned in this manner will be liable, in spite of themselves, to testify under a bias, instead of expressing the results of a dispassionate examination of scientific facts. The intention of the prisoner's counsel to plead insanity may not be known to the government-counsel in season to meet the plea with appropriate evidence, and if the prisoner is acquitted, the impression is conveyed, that the ends of justice have been defeated. Indeed, with every disposition to arrive at the truth, it is generally impossible under the present arrangements. In jails where prisoners accused of crime are confined, proper opportunities are not afforded for investigating their mental condition. In the few formal interviews to which the observation of the prisoner is confined, it may often happen that the real condition of the mind will not be discovered. If really insane, he will be likely to control his movements, and to discourse and appear very differently from what he would when left to himself and unconscious of being observed. Many insane, as we have already shown, manifest their aberration only under certain circumstances and on particular occasions, and appear quite correct at all other times. Many too whose insanity is recognized by every body who knows them, never evince it in their discourse, but solely in their ways and habits. If, on the other hand, the prisoner, is feigning insanity, he will summon all his powers to produce the requisite impression at these interviews, which, being short and few, the difficulty of his task is much lessened. To ascertain satisfactorily the mental condition of a prisoner suspected of being insane, he should be placed where the expert may be able to see him often, and at times when he is not aware of being observed. His words, and acts and movements, his manners and habits should be systematically watched, and a single day of such observation would often throw more light on the case than many formal interviews. We see no difficulty in so changing our modes of criminal procedure, that when the court shall be satisfied that there are reasonable doubts of the prisoner's sanity, it may be authorized to postpone the trial, and place him, in the mean time, in the charge of an expert — for which our hospitals for the insane,

furnish a convenient and suitable opportunity — whose report shall be received in evidence at the trial. This is substantially the course adopted in France, and nothing short of its adoption with us, will render the plea of insanity powerless for evil, and remove the suspicions of the community on this point.

It must be remembered that even the present imperfect method of ascertaining the mental condition of the accused, is not secured to him by any provision of law, but is only obtained with much difficulty by the efforts of his counsel, and by the sufferance of the government-officers who have the power and sometimes the disposition, to throw the most effectual obstacles in their way. We have it on the best authority, that a couple of medical gentlemen of the highest standing in their profession, who had been summoned to testify in the case of Freeman, above-mentioned, went to the jail for the purpose of observing his mental condition, and were refused admittance by the jailor, who said he had received a special order from the district attorney, not to let *them* see the prisoner. Had such a provision as we are advocating, existed in England, we should probably have never mourned over some of the foulest blots on the annals of her criminal jurisprudence. Mr. Baron Alderson would have had no occasion to say, as he did at the trial of Oxford, of Bowler's case which is quoted in all the books on criminal law, that it was a "piece of barbarity," and Lord Brougham could not have said of Bellingham's trial that "so great an outrage on justice never was witnessed in modern times."

Let it not be said that the time has gone by in England for such cases as these, and that the common law is now administered with all proper indulgence to the insane. That a considerable improvement in this respect has been made, we are willing to admit, but the following case convinces us that nothing short of an appropriate change in the mode of criminal procedure, will prevent the occasional occurrence of a "piece of barbarity."

On the 9th of August, 1843, a man named Higginson, was arraigned for the murder of his son. There were two counts in the indictment, one charging him with burying him alive, and the other, with fracturing his skull. Something being said respecting the mode of the murder, the prisoner spoke out in a very audible voice, "I put him in alive." He made no defence and had no counsel. Some suspicion of his sanity being expressed, the court requested that any one who knew anything of the prisoner in that respect, would come forward and testify. Whereupon two officers of the prison, one of whom had been a school-fellow of the prisoner and had known him ever since, testified that he was of "very weak in-

tellect," and the surgeon of the prison also testified that he was of "very weak intellect, but capable of knowing right from wrong." In the charge to the jury, the court, Mr. Justice Maule, said, that if the prisoner knew right from wrong, he was responsible for his acts, although he was of weak intellect. He was found guilty and executed.[1]

Such easy and precipitate convictions are strongly contrasted with the unceasing jealousy with which the *confinement* of the insane is watched in England. While the statute-book teems with enactments regulating this measure and hedging it around with checks and safeguards, the relations of insanity to the criminal law have been left entirely to the discretion of courts. An instance of unjust confinement is sufficient to arouse the attention of the whole community and lead to prosecution and penalties of the severest kind; but year after year have persons of doubtful sanity ended their lives on the gibbet, without one voice being raised in reprobation of the barbarity. A short time since a female patient in one of the best asylums in Scotland, sent a letter to the secretary of the Home Department, Sir James Graham, complaining of false imprisonment, in a very ingenious and plausible manner, and requesting an inquiry into her case,—such a letter, in fact, as those in charge of hospitals are in the habit of seeing every day. Her appeal was immediately answered, and so much importance was attached to the case, that the Lord Advocate of Scotland was directed to go down himself, see the patient and make a thorough inquiry into the matter. We have never heard that the home secretary or any one else, troubled himself about the fate of Higginson.

At present the only remedy for the conviction of an insane person, is the interposition of the executive, who is governed by the views he happens to entertain respecting the nature of insanity, and also respecting the principles that should regulate the exercise of his prerogative. Although therefore an inappropriate remedy for an evil that ought never to occur, yet in the absence of a better we would invoke its aid, and express the hope that in this high court of humanity, the victims of mental disease may ever look for protection from the passions of juries and the metaphysics of judges. We cannot better close this article than by noticing some recent instances of this kind of executive interposition in the state of New York where the plea of insanity in defence of crime seems to be remarkably common, because they indicate the progress of be-

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[1] Reg v. Higginson, (1 Carrington and Kirwan.)

nign and intelligent views, and deserve to be as widely known as possible, for the benefit of the example.

We have before us a pamphlet extracted from the transactions of the New York State Medical Society, entitled an "*Analysis of the testimony on the trial of Alvin Cornell for murder, and of the subsequent proof which led to the commutation of his punishment*," from which we gather the following facts. On the 22d of February, 1843, Cornell, then residing in Ashville, Chautauque county, New York, murdered his wife, and was brought to trial on the 25th of January, 1844. Insanity was pleaded in his defence, but not to the satisfaction of the jury, and he was accordingly convicted and sentenced to be executed. Governor Bouck, fearing, it would seem, lest the prisoner's case had been misunderstood, directed the testimony to be submitted for examination to Dr. Beck, the author of the estimable work on Medical Jurisprudence, and Dr. Brigham, the superintendent of the state asylum for the insane at Utica. They reported that they did not find sufficient evidence of insanity to be convinced of his irresponsibility, but enough of strange conduct to warrant further inquiry in order to ascertain whether other and subsequent facts might not throw light upon the case. An additional reason for further investigation urged by them was, that from want of pecuniary means, no witnesses were summoned from Washington county, where, it was said, many were acquainted with the fact of his previous insanity. Accordingly the governor directed that additional testimony should be taken in Washington county, and this, with a mass of other evidence, was again submitted to the above-mentioned gentlemen, who reported that the additional testimony showed "the probability of insanity at a period previous to the commission of the crime, and again the possibility of the individual being now in a doubtful state of mind." The result of this inquiry was the commutation of his punishment for that of confinement in the state-prison for life.

In the case of Wilcox, tried in Saratoga county, (N. Y.) last summer for the murder of Samuel M' Kinster, the indications of insanity were chiefly confined to delusion in connection with bodily ill-health, and though of the kind not calculated to strike the popular apprehension, yet such as would be readily recognized by those at all conversant with the disease. The jury, however, were not satisfied with the proofs of insanity, and the prisoner was convicted. According to the newspaper report, the evidence was submitted by Governor Wright to the chancellor, and to the three judges of the supreme court. The latter approved the verdict of the jury, while the former thought the proof of insanity was sufficient, and advised his detention in the lunatic asylum. The view of the chancellor

was adopted in part — the prisoner was rescued from the gallows, but sent to the state-prison for life.

In the case of Calvin Russ, tried and convicted in New York city, last winter, for the murder of his wife, the evidence certainly showed the existence of much mental disturbance, yet the jury probably regarded the instances which were related, as the immediate effects of intemperate drinking. On the strength of the evidence, Dr. Earle, the accomplished physician of the Bloomingdale Asylum, expressed the opinion that Russ was insane when he committed the murder. Such strong doubts having been thrown upon his mental condition, Governor Young concluded to commute his punishment for that of confinement for life.

With the deepest respect for the intelligence that rose above the influence of time-hallowed maxims, and for the moral courage that ventured to breast the current of popular feeling, we cannot help regretting that the generous purpose was not fully carried through. No reason is given why the fate of these persons was changed for confinement in the state-prison rather than the lunatic asylum, and we cannot conceive of any. If insane when they committed the acts for which they were tried — and there seems to have been no other ground for executive interference, but insanity — they were guilty of no crime, and could not rightfully be punished. The fault, in such cases, lies with society which neglects to protect its members from the aggressions of persons who are controlled by strong delusions, and then renders the latter responsible for the consequences of its own neglect. No doubt, their seclusion is necessary, but we have no right to associate them with convicted felons, and invest them with the habiliments of convicted crime. It may possibly be said, that their mental condition was doubtful, and that until unquestionable insanity appeared, the penitentiary was the more appropriate place of confinement. To this it need only be replied, that if their mental condition were at all doubtful, in no place would such doubts be more readily dispelled, and the question of their sanity or insanity more satisfactorily settled, than in a lunatic asylum. But progress is gradual, or should be perhaps, to be healthy, and we will not complain, because the governors of New York, have been unable, at a single step, to traverse the wide interval that separates views which were perfectly satisfactory to a past generation, from such as are demanded from the present advanced position of medical and legal science. Their worthy examples, with all their short-comings, will not be without the most salutary effect. We regard them as introductory to legislative reforms which will make that a claim of right and justice, which is now only the result of executive favor.

Recent American Decisions.

Supreme Judicial Court, Massachusetts, April Term, 1847, at Worcester.

ALPHONSO BROOKS ET UX. *v.* JOHN WHITNEY ET ALS.

Construction of will; — Life estate; — Duty of executor. A. W. paid for land, took a bond for a deed and went into possession. He then died devising the land to his children as tenants in common, and appointing J. W., one of the children, executor. J. W. took a deed from the obligor to himself, described however as executor. *Held*, in a petition for partition by the other devisees, that he could not set up the deed to show the entire legal title in himself and defeat the petition.

THIS was a petition for partition of a lot of about one hundred and seventy-six acres of land in that part of Princeton formerly called No-town. The petitioners claimed the land as devisees of Andrew Whitney. The other respondents having been defaulted, John Whitney appeared, and admitting that the petitioners were entitled to partition of a part of the one hundred and seventy six acres, called the Chandler lot, denied their right as to the residue called the Ward lot; claiming the same as his own, either by a parol gift from his father, the aforesaid Andrew Whitney, in his lifetime, and an adverse possession by himself for more than twenty years since, or by force of the will of said Andrew, or by virtue of a deed from Samuel Ward and wife, the former owners. In regard to said deed, it appeared that the said Andrew bargained for the lot, but, being unable to procure a deed on account of the minority of said Samuel's wife, took from him a bond that she should convey it when of age; that from that time acts of ownership were done upon the lot by said John, either for himself or his father, with whom he then lived; that said John, having possession of said bond as executor, procured a quitclaim deed from said Samuel and wife to himself, described as "John Whitney, Executor of Andrew Whitney." The will of said Andrew, after giving the homestead to his wife during widowhood, and making several other provisions, gave to said John one half the homestead, subject to the devise to the wife, "to him and his heirs forever." Then followed this clause: "I also give to my said son John the use and improvement of one half of the Chandler lot, in No-town, to be held by him until the death or intermarriage of my

wife, together with one half of all my lands in No-town." The widow died previously to the commencement of the suit.

The jury returned a verdict for the plaintiff; finding specially, that the consideration for the land conveyed by Ward and wife was paid by the said Andrew in his lifetime; that there was no such gift by him in his lifetime to said John, and no possession taken by John claiming under such gift.

Exceptions were filed by the respondent.

Thomas & Hartshorn, for the petitioners, cited *Right* v. *Sidebotham*, (Doug. 759); *Cole* v. *Rawlinson*, (1 Salk. 234); (1 Story's Eq. Jur. 315, 316, 322, 323); *Van Epps* v. *Van Epps*, (9 Paige, 241); *Greenlaw* v. *King*, (5 Lond. Jur. 18); *Van Horne* v. *Fonda* (5 Johns. Ch. R. 388, 407); (Story on Agency, 210); *Taylor* v. *Salmon* (2 Meeson and Crompton, 139); *Fermor's case*, (3 Coke, 77); *Bright* v. *Lyman*, (1 Burr. 397); *Worsley* v. *De Mattos*, (1 Burr. 474); *Jackson* v. *Burgot*, (10 Johnson R. 462); *Warren* v. *Childs*, (11 Mass. 226); *Litchfield* v. *Cudworth*, (15 Pick. 31); Co. Lit. § 307, 472, and page 276; *Flagg* v. *Mann*, (2 Sumner, 520); *Shumway* v. *Holbrook*, (1 Pick. 117); *Smales* v. *Dale*, (Hob. 120.)

C. Allen and *Dewey*, for the respondent, cited, 10 Wheaton, 204; *Kempton* v. *Cook*, (4 Pick. 305); *Howe* v. *Bishop*, (3 Met. 26); *Bonner* v. *Kennebec Purch.* (7 Mass. 475); *Rickard* v. *Rickard*, (13 Pick. 253); *Bigelow et Ux.* v. *Jones*, (10 Pick. 161); *Allen* v. *Thayer*, (17 Mass. 302); *Prop. Ken. Purch* v. *Laboree*, (2 Greenl. 285); *Blood* v. *Wood*, (1 Met. 528); *Parker* v. *Prop. Locks and Canals*, (3 Met. 91); *Pray* v. *Peirce*, (7 Mass. 381); *Taylor* v. *Howe*, (1 Burr. 113.)

Dewey, J. This is a petition for partition, in which the petitioners claim under Andrew Whitney. The Chandler lot, it is conceded, they hold as tenants in common; but the respondent denies their title to the other part because first, if it was Andrew Whitney's the respondent takes it all under the will; second, Andrew never had any deed, and the estate is vested in John.

The first question depends upon the construction of the will of Andrew. The Court are of opinion that the gift of John was of an estate determinable on the marriage or decease of the widow of the testator. This is clearly shown by its connection with one half the Chandler lot; and it is not given to the devisee, his heirs and assigns, though these words are used in other parts of the will.

The respondent then insists that the petitioners have no legal estate in the lands other than the Chandler lot, assigning the ground that Andrew Whitney was not legally seised of the residue and had no title which he could transmit, but that John Whitney acquired it by deed from Samuel Ward and wife. It is true, such is the apparent paper title; and, if the question were to be decided by the deed alone, the respondent has the better title.

The question is, can John Whitney set up the deed from Ward and wife against the heirs? The facts found were, Andrew contracted, paid the consideration, and took the bond. For the respondent it was contended there was an adverse possession; this was submitted to the jury and depended upon another fact also relied on, viz. a parol gift. The verdict removes all difficulty. Nor do we perceive any difficulty in the want of a paper title. Andrew being in possession claiming title could transmit it as against strangers. The only real difficulty is the deed; if that is valid the respondent has the superior title. The objections to it arise from the contracting, payment, and taking the bond by Andrew. John came into possession of the bond as executor, and holding this relation, took the deed to himself and heirs, describing himself however as executor. We are not prepared to say the mere description alone would prevent his holding personally; but he held a fiduciary relation, and was bound to protect the interests entrusted to his charge. As such executor he held the bond; as such executor he was bound to take such a conveyance as would enure to the benefit of the devisees, and not devest their estate. An executor cannot purchase an estate which he is directed to sell, and the same principle, though differently applied, should have prevented his taking this deed to himself. The law will not allow him to take the deed in such way as to defeat the interests he was bound to protect. Such is the rule in equity where the deed would be set aside, and in this state, the same end is attained at law by considering the deed voidable. It was a fraud in law to take the deed. John Whitney cannot therefore set it up against the devisees, they having elected to avoid it. It is upon the same principle that deeds to executors have from time to time been avoided.

The petitioners are to have partition as prayed for.

LEWIS *v.* THE WESTERN RAILROAD COMPANY.

Common-carriers; — Negligence.

DEWEY, J. These are exceptions from the court of common

pleas, in an action for negligence of the defendants in the transportation and delivery of a block of marble sent from the western part of the state. The general principles of law as to the duties of common-carriers in regard to delivery are well settled, and if there were no peculiar circumstances, and the defendants' servants had, of their own mere motion, undertaken to deliver the block at another place, it may be that the defendants would have been liable, though it were done without orders. The error, if any, was in disregarding the facts tending to show that the defendants were excused from liability after the stone left their depot. The duty of the defendants was to deliver at their depot, but this might be modified. Suppose a bale of goods were transported, and the owner steps into the cars and asks a delivery there; this delivery is perfect, and if they are injured in taking out, the loss is his. The place of delivery may be varied by the parties. The real question in this case is, were the defendants discharged from their liability for the stone after it left their depot? It seems there was evidence tending to show this. Had the plaintiff been present at the depot and done the same acts that Lamb did, no doubt the defendants would have been discharged. The whole question turns on Lamb's authority. To this point the court was particularly directed, and there seems an omission in the charge. The jury should have been instructed, 1. If Lamb was authorized to receive delivery of the block, an article requiring peculiar care, and, instead of receiving it at the depot of the defendants, requested their agent to permit the cars to be drawn to the Boston and Worcester depot, these acts, being incident to the delivery, were within the authority conferred by the plaintiff. 2. If Lamb required delivery in this mode, instead of at the defendants' depot, from the time the cars left their depot the defendants ceased to be responsible either for the skill and care of the persons or strength of the machinery employed. 3. The general duty of the defendants, as common-carriers, was to deliver at the usual place, in this case at their depot; but it was competent for the plaintiff to assent to a delivery elsewhere. If the plaintiff requested such a delivery, and the agent of the defendants consented, from the time the stone left the usual place of delivery, it was delivered, and the defendants' liability as carriers ceased.

Exceptions sustained.

Barton & Dewey, for the plaintiff.
Chapman, for the defendant.

Ex parte John L. Wedge.

A warrant was issued against an insolvent, appointing the first meeting of the creditors December 26th. The messenger advertised that the meeting was to be on December 28th. The meeting was in fact held on the 26th, and an assignee appointed. *Held*, the proceedings were void.

This was a petition by John L. Wedge for a mandamus on Charles W. Hartshorn, a master in chancery for the county of Worcester. It appeared that December 2, 1846, Wedge petitioned for the benefit of the insolvent law, before the said master, who thereupon issued his warrant, in the usual form, returnable the 26th of same month, on which latter day the messenger made return of his warrant, setting forth that he had served it as therein directed. The first meeting of creditors was accordingly then held, a debt proved, an assignee appointed, and order for the second meeting and an assignment made and delivered to the assignee. On the 28th of the same month it was discovered that the messenger had, by mistake in his advertisement, given notice that the meeting would be on the 28th, instead of the 26th, as directed; and the master was requested to stay all proceedings and issue a new warrant on the same petition, and this he declined doing without the direction of the court.

Fuller, for the petitioner.

Dewey, J. held, that the proceedings under the warrant were void, and directed an order to issue to the master to stay all further proceedings under it, to issue a new warrant on the same petition, and to the assignee to deliver up the property in his hands to the messenger.

Supreme Judicial Court of Maine, April, 1847, *at Portland.*

Christian F. Pudor *v.* Boston and Maine Railroad.

Liability of railroad proprietors; — Evidence of plaintiff as to contents of trunk.

This was an action on the case against the defendants, in which the plaintiff alleges that he put on board of the baggage car of the defendants, to be transported to Portland, a box containing books, surgical instruments, medicine, chemical apparatus, one item stated to have been sugar of milk, and articles of clothing; the whole

being of the value of ninety-three dollars. The defendants consented to be defaulted for one dollar as damages, being the value of the box. The plaintiff offered himself as a witness to prove the contents of the box, but the court did not permit him to be sworn. And the question whether he should have been admitted was submitted to the court, who held he was, under the circumstances of this case, inadmissible to give testimony.

In the course of the remarks of SHEPLEY, J., who delivered the opinion, intimations were given, that if it had been the plaintiff's travelling trunk of wearing apparel that had been lost, which it might reasonably be expected he would pack up himself, and not in the presence of any one else, the decision might have been different. He seemed to think that there would be but little danger of imposition upon railroad proprietors, from the relaxation of the rule excluding parties from testifying in their own cases, so as to admit travellers to testify to the contents of a trunk of clothing; as any extravagance in the estimation of the quantity and quality, and number of articles, would be susceptible of detection, from the knowledge which might be obtained of the kind and amount which it might be reasonable to believe, under all the circumstances of his particular condition, that he would have with him. Several cases in Pennsylvania were noticed, which seemed to have sanctioned such a doctrine. But as to money, books, instruments, and such articles, which are not exposed to public view, the defendants would have no protection against the testimony of the plaintiff; and the rule of public policy, which debars a plaintiff from being a witness, must be enforced

Swett, for the plaintiff.
Codman & Fox, for the defendants.

ALONZO TUBBS ET AL. *v.* W. P. SMITH.

Attachment; — Officer; — Fraudulent sale; — Trespass.

THIS was an action of trespass *de bonis asportatis* for a quantity of merchandise, attached by the defendant, as sheriff of the county of Cumberland, on a writ in behalf of a creditor against his debtor, by the name of Libby. The plaintiffs claimed under a sale made to them by Libby, which the jury found to be fraudulent as against his creditors. But the plaintiffs insisted that the defendant was not entitled to set up that defence, by reason of a failure so to conduct in reference to the property attached, as to render himself

a trespasser *ab initio*. But upon the authority of the case of *Dagget* v. *Adams*, (1 Greenl. 198) the Court, in their opinion, delivered by SHEPLEY, J., held that, as as the plaintiffs were found to have been fraudulent venders as against the creditors of Libby, and the sale therefore void as it respects the rights of the attaching creditor, they could not be permitted to sustain their action upon any such ground; and judgment was entered upon the verdict, which was for the defendant.

Howard & Shepley, and *Deblois*, for the plaintiffs.
Willis & Fessenden, and *Codman & Fox*, for the defendant.

BANK OF CUMBERLAND *v.* THOMAS MCLELLAN.

Bond for liberation from arrest; — Construction of statute; — Interest.

THIS was an action of debt upon a bond, executed by the defendant, as principal, under the Revised Statutes, c. 148, § 20, to obtain liberation from arrest on execution. Judgment had been rendered against him and his sureties, for the amount of the execution, by virtue of which the arrest had been made. And it was insisted by the plaintiffs that, by section 39 of the same statute, they were entitled to execution against the principal, the defendant, for interest at the rate of twenty per cent. on the amount of the execution, on account of his avoidance and non-compliance with the condition of the bond. But it was objected that the bond was not such as was required by the 20th section, and therefore, that the 39th section did not apply to the case; that the bond was good against the defendant only at common law, or by virtue of section 43 of the same statute, which was an enactment only in affirmance of the common law, and therefore that the judgment already entered up was all that the plaintiffs were entitled to recover; and of this opinion were the Court, who remarked, in their opinion delivered by WHITMAN, C. J., that the object of section 43 was merely to render a bond not taken for double the amount of the debt, &c., valid, as had before been decided at common law, and to exonerate the officer taking it from liability beyond the actual damage thereby sustained, if it should appear that he had been prevented from taking it as required by section 20, by reason of any evident mistake or misapprehension.

Haines, for the plaintiff.
Howard & Shepley, for the defendant.

State of Maine *v.* Justus C. Keene.

Perjury; — Form of oath.

The defendant was indicted for the crime of perjury. The oath was in the form usual to witnesses sworn in chief. It was taken before referees, he being one of the parties, and in reference to his book-account against his debtor. On demurrer to the indictment, he insisted that the oath administered to him was illegal and void; that it should have been to make true answers to such questions as might be put to him, &c., in the usual form of the *voire dire* oath. The court ruled that, as he offered himself to be sworn, and made no objection to taking it as administered, it was legal so to administer it, especially before referees. Other objections to the indictment were urged, but were of no essential importance, and were overruled.

Abraham W. Anderson *v.* John Corless.

Husband and wife; — Liability of husband; — Elopement of wife.

Assumpset for medical attendance upon the defendant's wife, the plaintiff being a physician. It appeared that the wife had eloped from the bed and board of her husband, about six months prior to the performance of the services, and had resided with her mother. The court held that the plaintiff could not recover, as no evidence was offered proving that the elopement was justifiable by reason of the ill treatment of the husband.

State *v.* Colby Wilder.

Adultery. *Held*, that the husband of a woman, with whom the act was committed, was not a competent witness to prove the act.

Court of Common Pleas, Massachusetts, Suffolk County, January Term, 1847, at Boston.

GEORGE T. CURTIS *v.* SETH F. NYE.

Plea in abatement; — Authority to employ counsel; — Action by counsel for professional services; — Principles on which compensation for such services is to be estimated.

THIS was an action, brought to recover the sum of two hundred and twenty-five dollars, charged by the plaintiff for professional services, in advocating a petition for a railroad from Sandwich to Plymouth, before a committee of the legislature, in March, 1846. The defendant pleaded in abatement the non-joinder of about two hundred other persons, being the residue of the petitioners, all of whom resided in the town of Sandwich, except Watson Freeman, who resides in Boston. Issue was joined upon a replication to this plea. MERRICK, J. ruled that the plaintiff should open and close, and that the question of damages was open to both parties.

The plaintiff proved his retainer, by the defendant, in the following manner: Mr. C. H. Warren testified, that when the hearing on the petition of "Seth F. Nye and others" was about to come on before the committee, the defendant applied to him to act as counsel for the petition, but that, on account of his other engagements, he declined. The defendant then requested Mr. Warren to recommend some one, and he recommended the plaintiff, and offered to see the plaintiff for the defendant and engage his services. This offer was accepted, and Mr. Warren saw the plaintiff, and stated to him, in answer to an inquiry, that the defendant was a person of respectability and pecuniary responsibility; and the plaintiff thereupon agreed to be retained in the case. Subsequently, on the same day, the defendant called at the plaintiff's office, in company with a gentleman who introduced him, and instructed the plaintiff in the case, and the hearing commenced soon after, and was continued through five sessions of the committee, held in the morning from nine to eleven o'clock. The defendant was the only petitioner who attended the hearing; and being allowed to testify before the committee, he there stated that he started the petition itself, and that he procured most of the signers to it, and that he owned real estate in Plymouth. Watson Freeman testified that he never gave the defendant any authority to employ counsel on his behalf, or to incur any expenses on his

account; and that he signed the petition merely to oblige the defendant.

Messrs. Warren, E. H. Derby, and F. B. Crowninshield, the latter a member of the committee, who were acquainted with the services performed by the plaintiff, testified, that, in their judgment, the plaintiff's bill was a reasonable and proper charge for the services rendered. All these gentlemen concurred in saying that this branch of professional labor is very arduous and irksome, and involved subjects of a new character, and is usually required to be remunerated at a higher rate than services in the courts, which occupy the same length of time. It was admitted that the application in this case was not successful, a rival road having been chartered.

The defendant introduced the original petition, but proved none of the signatures to it, except his own and that of Watson Freeman. He also introduced a bill rendered by the plaintiff to the defendant, in which the charge was made to "Seth F. Nye and others, petitioners for a railroad, &c." The court intimated that the plea in abatement necessarily failed, if the jury believed W. Freeman, and also because the other signatures were not proved. But the defendant's counsel claimed the right to go to the jury upon the question of the contract, as well as the damages.

William Dehon and *George T. Curtis*, for the plaintiff.
B. F. Hallett, for the defendant.

Merrick, J. instructed the jury: 1. That if they believed the testimony of Freeman, the plea in abatement could not be sustained. It was necessary, in order to make out the defence, that the defendant should show that each and all of the persons named in the plea contracted with the plaintiff. If one of them did not make any such contract, or did not authorize it to be made by the defendant on his behalf, the plea failed to be supported by the proof. Again, they were to inquire, whether there was any evidence that any of the persons whose signatures purported to be upon the petition, except the defendant, contracted with the plaintiff. If they did not, the plaintiff was entitled to a verdict, for he had proved that the defendant did contract with him for the services which were rendered. 2. Upon the question of damages, it was for the jury, in their sound discretion, to allow the plaintiff what he reasonably deserved to have for his services. The first element in this determination was to be found in the testimony of the witnesses, who were competent to speak to the point. They

had testified that the charge was reasonable, and that, in their opinion, the services which were actually rendered, could not have been procured for a less sum. A professional service is worth just what it will bring; what the community are willing to pay. It has its market value, like all other services. A man may be hired for a dollar a day to do some kinds of work, but a counsellor of the court cannot be hired for a like sum to perform the services peculiar to his profession. Why is this? why is the service of a physician, who enters a sick-room and spends a short time with a patient, said to be worth more than the service of a porter, who spends the same time in transporting a heavy burthen by the exercise of physical strength? First, because there is a difference between physical and intellectual labor, which mankind choose to recognize, and to remunerate accordingly. Secondly, because the training, education, and discipline of professional men is a slow and costly process. Why is it, that there is a difference in the value of the services of different members of the same profession? Because there are diversities of gifts; because experience, skill, and faculty of using professional knowledge, make differences, even where there is the same diligence and fidelity. These qualities will command higher rates of remuneration; and because they will command more, they are worth more. It had been argued, that the legal profession is a monopoly. It is a monopoly very widely diffused, and any man may enter into it who will qualify himself to perform its duties. After he is qualified, no one is bound to employ him; but if he is employed, he is entitled to the remuneration which services of the same quality will command from others. It had been said, that the legislature did not like to have the lawyers come before their committees, and make these long arguments. If so, and if, when called to render these services, the members of the profession exposed themselves to displeasure and obloquy, it was for the jury to consider whether that circumstance ought to diminish their compensation. Evidence had been offered to show, that the services of counsel before committees of the legislature were more arduous and irksome than the ordinary routine of professional duty in the courts; that the attendance was irregular, and therefore it interrupted other engagements; and that it took counsel away from their places of business, and carried them for a time away from their clients; and that the subject of railroads involved new branches of learning, which must be mastered by the advocate. If so, these circumstances ought to enhance the compensation of counsel. In the present case the jury had the means of judging what the services were. It was for the jury, in their

sound judgment, to say what they were reasonably worth, and to add to that sum interest from the date of the writ. The jury were out about four hours, and the next day returned a verdict for $204 47.

Supreme Judicial Court of Massachusetts, Suffolk County, May, 1847, at Boston.

PHILO S. SHELTON AND OTHERS, IN EQUITY, *v.* WILDES P. WALKER.

Where an assignee, under the statute of Massachusetts for the relief of insolvent debtors, had exercised undue influence in procuring his appointment as assignee, and his interests were adverse to those of the other creditors, and he had used improper means, since his appointment, to secure a preference to himself for his claims against the insolvent debtor, the court ordered that he should be removed, that his assignment should be revoked, that the master in chancery should call a meeting of the creditors to choose another assignee, and that the former assignee should make to the new assignee all necessary conveyances.

THIS was a bill in equity by a portion of the creditors of Elias D. Pierce, against the assignee of his estate in insolvency. It appeared that Pierce presented his petition in insolvency on the twenty-ninth of June, 1846; that the first meeting of his creditors was held on the eleventh, and by adjournment on the sixteenth of July following; that Walker was present at this meeting, proved several large claims against Pierce's estate, and after the balloting was declared assignee by the master. That on the twenty-seventh of June, 1846, a suit was commenced in the United States circuit court for this district, by R. N. Berry, in the name of a citizen of Maine, on which all Pierce's visible property was attached. That on the same day Walker commenced a suit in the same court in the name of Alfred J. Stone, of Brunswick, Maine, upon a note of Pierce's for $1000, and his acceptance for $1,463 27, in which he caused a second attachment to be made of Pierce's property; that after Walker became assignee he instructed counsel to enter an appearance in his behalf in both these suits, but subsequently caused the appearance to be withdrawn in the suit in Stone's name, and Pierce was accordingly defaulted November 14, 1846; and that he consented to a sale of the goods attached. The complainants alleged in their bill that this arrangement was made by Walker for the purpose of securing to himself the payment of the note and acceptance, in preference to the other creditors, and that if

Stone had been the true owner of the note, there was a good defence against it in law, which the assignee ought to have set up, but which he neglected to do. It was also alleged, that after Walker became assignee, he caused suits to be commenced in Maine, against Pierce, in the name of Nathaniel Walker, his father, and summoned a large number of persons in that state, who were indebted to Pierce, as trustees; that he entered no appearance in these suits, and that Pierce was defaulted; and it was alleged, that this was done by Walker with the intention of obtaining judgment for the whole of his claims against Pierce. The bill prayed for an injunction upon Walker against proceeding further in these suits, and for his discharge from his trust as assignee.

Sidney Bartlett and *P. W. Chandler*, for the complainants.
William Dehon, for the defendant.

Shaw, C. J. delivered the opinion of the court. He said, that by the statute of 1838, c. 163, the court was invested with the general jurisdiction of all cases under the statutes, and also by way of petition or bill to decide all questions arising therein. This general superintendence was necessary, as the provisions of the law were to be carried into effect by a great number of magistrates, and were similar to the jurisdiction of the chancellor over proceedings under the English bankrupt law. The grounds of complaint against the assignee were, in this case, that he had exercised undue influence in procuring his appointment as assignee; that his interests were adverse to those of the other creditors, and that he had used improper means to secure his claims against the insolvent. It had been decided in England, that one who had an adverse interest, or who pursued his interest in opposition to that of the creditors generally, was an unfit person to be assignee. The cases cited by the counsel for the complainants, *Ex parte Townshend*, (15 Ves. R. 470); *Ex parte De Tasted*, (1 Rose's R. 324), and *Ex parte Shaw et al.* (1 Glyn & James. R. 127,) fully sustained this position. It was not merely on account of the large amount of the demand for which the assignee might be interested; for all creditors might be supposed to have opposing interests in their claims upon an insolvent estate. But to disqualify him he must be in such a situation as to be under temptation to secure himself from a scrutiny to which he would have been subjected, had another been assignee, or he must have manifested some intention to use his position to obtain some undue advantage.

With regard to the suit commenced in the name of Nathaniel Walker, whatever the relation might be between father and son,

the whole benefit was for the defendant. It was a question whether this suit was brought before or after the defendant became assignee; but whether it was before or after, the effect was to withdraw so much from the assets; and these proceedings, subsequently, were under the control of the defendant. The entry of the suit after his becoming assignee, and his proceeding to charge the trustees, were inconsistent with his duties to the creditors. The object of this suit against Pierce, must have been to obtain some particular benefit to the assignee.

Another fact relied upon by the complainants was, that it had been agreed, that the suit brought on the note, which had been indorsed to Stone, should be discontinued, but since the appointment of the assignee it had been entered as the suit of Stone. This prosecution of the suit through the indorsee was inconsistent with the assignee's duty. An attachment of property would have enabled the assignee through Stone, by a secret agreement, to obtain a preference over the other creditors. It had been argued, that Walker might take any course which another creditor might take. This was true until he became assignee; then he had two duties; one was to resist all unjust claims upon the estate, and the other to make the most of the property, for the benefit of all. The ground of the complaint here was, that the assignee had a private and separate interest, which he pursued through means of other persons, under circumstances in which it would have been difficult, if not impossible, for the creditors to be protected. The creditors of an insolvent were passive. They trusted to the assignee, and were not put upon inquiry which would detect any improper action of the assignee. The prayer of the petition must be granted.

A decree was accordingly entered in these words: — This cause having heretofore been brought on to be heard upon the pleadings filed, and the proofs taken thereon; and the said proofs having been read, and Mr. S. Bartlett and Mr. P. W. Chandler, of counsel for the complainants, and Mr. William Dehon, of counsel for the defendant, having been heard, and the court having duly considered the said pleadings, proofs, and arguments, it is ordered, adjudged, and decreed, that the said defendant be removed from the trust of assignee of the estate of Elias D. Pierce, the insolvent debtor in the said bill of complaint referred to, and the assignment of the estate and effects of the said insolvent debtor, made to him, said Wildes P. Walker, be, and the same is hereby revoked and annulled; and that a meeting of the creditors of the insolvent debtor

aforesaid, be called by George S. Hillard, Esquire, a master in chancery, within and for the county of Suffolk, at such time and place as he may deem expedient, for the purpose of choosing another assignee in the place of the said defendant, removed as aforesaid. And it is further ordered, that the said master in chancery execute and deliver to the assignee so chosen, a new instrument of assignment, in due form of law, of all the property of the said insolvent debtor. And it is further ordered and decreed that the original instrument of assignment, made by the said master in chancery to the defendant, be given up and cancelled, and filed with said master. And it is further ordered and decreed, that the defendant shall make and execute to the assignee, who shall be chosen as aforesaid, all such deeds, conveyances, and assurances, and do all such other lawful acts and things, as may be directed by the said master, and needful or proper to enable the new assignee to demand, recover, and receive, all the estate of the said insolvent debtor. And it is further ordered and decreed, that the said defendant do pay to the complainants the costs of this suit, to be taxed, and that the said complainants have execution against the said defendant therefor, according to the course and practice of the court. It is further ordered, that a copy of this decree, duly authenticated, be filed with George S. Hillard, Esquire, the said master, to be entered with his proceedings in the said cause.

Circuit Court of the United States, Massachusetts District, April, 1847, *at Boston.*

UNITED STATES *v.* THE PROPRIETORS OF THE NEW BEDFORD BRIDGE.

Corporation chartered by state laws; — Construction; — Offences at common law; — Jurisdiction of United States courts; — State legislation; — Internal commerce and police; — Constitutional law; — Contempt; — Bridges over tide water; — Obstructions in navigable rivers; — Crimes and penalties; — State sovereignty; — Nuisance; — Jus publicum and jus privatum; — Northwestern territory ordinance; — Civil suit for special damage; — Admiralty process and criminal law; — Indictment; — Misdemeanors.

THIS was an indictment for a nuisance. It alleged that the river Acushnet, running by the town of New Bedford, is and has immemorially been, an ancient navigable public river and common highway, within the ebb and flow of the sea, and running through the

collection district, and port of entry of New Bedford, and navigable by that port and the port of Fairhaven, for vessels of ten or more tons burthen, and whereupon vessels had been accustomed to pass and repass at pleasure; and that the defendant corporation unlawfully built a bridge across the said public maritime way, obstructing and preventing the passage, to the great damage and common nuisance of the citizens of the United States, and the citizens and subjects of foreign nations, in alliance with the United States, there passing, &c. Another count, charged the corporation with throwing in quantities of rocks, gravel, earth, wood, and other materials, and raising a mound across the stream. A third count alleged, that the port of New Bedford had been for a long time an ancient port of entry, and that the corporation had choked up the channel of the stream, obstructing that part of the river above, and preventing the flow of the water which rendered the port deep, safe and commodious, &c.

The defendants' counsel moved that the indictment be quashed, on the ground that congress had not declared the act charged in the indictment to be an offence against the United States, and therefore this court has not jurisdiction to try the same, or render judgment therefor.

Robert Rantoul, Jr. District Attorney, and *Charles L. Woodbury*, for the United States.

Rufus Choate, *Benjamin R. Curtis*, and *J. H. W. Page*, for the defendants.

Woodbury, J. delivered the opinion of the court, quashing the indictment, in which he made the following points; — 1. In an indictment against a corporation for obstructing the navigation of a river, but which had been authorized by a state law, the construction as to its acts must be liberal in its favor. 2. Nothing can be deemed an offence by such a corporation, in the courts of the United States, except what has been made so by the constitution, or a treaty, or an act of congress. 3. These courts being of limited jurisdiction, under a government of limited powers, a case must be clearly within its jurisdiction, or it will be dismissed, whenever and however the objection is made. 4. A grant of power to congress, probably, does not prevent the states from continuing to act on subjects within the grant, till congress legislate fully concerning it, and so as to conflict with the doings of the state, — unless there is an express prohibition on the states to act further in the matter, or it is strongly implied from the nature of the case. 5. Where the states do not grant to congress powers over their internal com-

merce or police, those powers can continue to be exercised to any extent by them till they conflict with the proper exercise by congress of other powers, which are granted to it; such as those over foreign commerce and the revenue; and then the acts of the state, so far as repugnant and conflicting with the due exercise of the other powers by congress, must yield. 6. A grant of powers to congress in the constitution over certain subjects, does not invest any particular courts with that power, till congress confer it by a law, except in case of some specified powers given in the constitution to the supreme court. 7. The authority to punish, for contempt, is granted as a necessary incident in establishing a tribunal as a court. 8. The common law cannot be resorted to for aid in giving jurisdiction to the courts of the United States, but only in deciding questions after jurisdiction is otherwise obtained. 9. The grant of power to congress to regulate foreign commerce, and the declaration that the judicial power shall extend to all cases in admiralty and maritime jurisdiction, do not enable a court to punish any act as a crime, unless some part of the constitution, or a treaty, or some law of congress, makes it a crime, and confers authority on that court to punish it. 10. The act of 1789, as to the powers of the circuit court, neither makes such act a crime, nor confers on this court authority to punish the erection of a bridge over tide-water, or the obstruction of navigation in navigable waters. 11. *Semble*, it may have done the last, if it had been declared to be a crime. 12. Nor do the treaties with foreign powers, allowing ingress and egress to our ports for trade, do either, nor the acts of congress creating the port where the obstruction is, a port of entry, or making a collector of duties there, or giving coasting licenses to vessels, or punishing breaches of the revenue laws. 13. The old states had, before the constitution, a sovereign power over tide-waters as well as others navigable, and could obstruct them by bridges or other ways, when they deemed them demanded by the public interests. 14. They still retain the powers before possessed, except where granted to congress and legislated on, unless prohibited. 15. But individuals could not so obstruct them, without being liable at common law, in most of the states, to a prosecution for a nuisance. 16. If individuals owned the soil beneath or adjoining such rivers, it was subject to the easement of navigation by the public, this *jus publicum* being not inconsistent with the *jus privatum* in the soil. 17. The states composed from the northwestern territory cannot obstruct their navigable rivers, they being by the ordinance declared to be forever public highways. 18. When the old states obstruct their own navigable rivers by laws, the persons acting under those laws are

not punishable in the state courts for such acts, unless the acts are contrary to some clause in the constitution, or a treaty, or an act of congress; then they are, and also in the courts of the United States, if some act of congress makes it a crime, and gives power to that court to punish it. 19. When an individual suffers special damage by such an obstruction, he may have civil redress by suit, though the obstruction be authorized by a state, but is contrary to or conflicts with some clause in an act of congress, such as a coasting license. 20. The admiralty processes, conferred by the constitution, are such as were exercised in England, when the constitution was adopted, except as modified here by the colonies, and not such as existed in England in the fourteenth century, or on the continent of Europe in 1789. And cases under these, involving questions not then settled in the English courts or here, are to be settled by the civil law, the laws of Oleron, and other sea-laws of general use and credit. 21. The admiralty law, as to crimes, at no period, has yet been adopted, either by the constitution, or any act of congress; and the adoption of it as to civil cases, without defining at what period and in what place, and with what restrictions, has proved embarrassing to the courts. 22. By the admiralty law as to crimes, such an offence as that in this indictment would not be punished in the admiralty in England, since the 15th of Richard II. Nor is it known that it could be in the vice admiralty courts in the British colonies. 23. It is doubtful whether any such misdemeanors as this were punishable in the admiralty courts at all, since the 22d of Henry VIII., but merely felonies. Certainly no offences committed like the acts in this case within the body of a county, and not on the high seas, and not great ships in great rivers below the bridges, would be punished in an admiralty court. 24. The only mode of punishing acts as crimes which obstruct the navigation of rivers and ports within the limits of a state, and are not now crimes under the laws of a state or the United States, is by further legislation by congress, under its authority to regulate foreign commerce and that between the states, declaring what obstructions shall be penal if not removed or modified, and in what courts the offence shall be tried.

Digest of American Cases.

Selections from 3 Story's (United States Circuit Court) Reports. (Continued from p. 89.)

PARTNERS.

1. Where a bill in equity is brought to recover a debt against the estate of a deceased partner, the other partners are proper and necessary parties; and although when they are out of the jurisdiction of the court they may be dispensed with, yet this exception does not apply to cases (like the present) involving important rights of the absent partners, and especially not to cases where the facts are mainly in their knowledge, or where the circumstances occurred in the place where they are. *Vose* v. *Philbrook*, 336.

2. *Quære*, Whether under the Revised Statutes of Massachusetts a set-off of a partnership debt can be made at law against a separate debt due to one of the partners except in cases of dormant partners; it certainly cannot be in equity. *Ib.*

PATENT.

1. The decision of the commissioner of patents is conclusive as to the law and facts arising under an application for a patent, unless it be impeached for fraud or connivance between him and the patentee; or unless his excess of authority be manifest on the face of the papers. *Allen* v. *Blunt*, 740.

2. The patent act contemplates two classes of persons, as peculiarly appropriate witnesses in patent cases, viz.: 1st. Practical mechanics, to determine the sufficiency of the specification as to the mode of constructing, compounding, and using the patent. 2d. Scientific and theoretic mechanics, to determine whether the patented thing is substantially new in its structure and mode of operation, or a mere change of equivalents; and the second class is by far the higher and the most important of the two. *Ib.*

3. An injunction granted on an original bill, before the surrender of a patent, cannot be maintained upon the new patent, unless a supplemental bill be filed, founded thereon. *Woodworth* v. *Stone*, 749.

4. A patentee cannot, by a surrender of his patent, affect the rights of third persons, to whom he has previously assigned his interest in the whole or a part of the patent, unless the assignees consent to the surrender. *Ib.*

5. To support an action at law for the breach of a patent, it is indispensable to prove a breach before the action is brought; but, if the patent right be admitted or established, a bill in equity *quia timet* will lie for an injunction upon well-grounded proof of any apprehended intention of the defendant to violate it. *Ib.*

6. The decision of the commissioner of patents in respect to accepting a surrender of an old patent, and granting a new one, is not reëxaminable elsewhere, unless it appear on the face of the patent, that he has exceeded his authority. *Ib.*

7. The extension of a patent may be granted to an administrator. *Washburn* v. *Gould*, 122.

8. Whoever finally perfects a machine, and renders it capable of useful operation, is entitled to a patent, although others may have had the idea, and made experiments towards putting it into practice, and although all of the component parts may have been known under a different combination, or used for a different purpose. *Ib.*

9. Drawings, not referred to in the

specification of a patent, may be treated as part of the specification, and used to explain and enlarge it. *Ib.*

10. The meaning of technical words of art in commerce and manufactures, used in a patent, as well as the surrounding circumstances, which may materially affect their meaning, are to be interpreted by the jury. *Ib.*

11. Every instrument is to be interpreted by a consideration of *all* its provisions, and its obvious design is not to be controlled by the precise force of single words. *Ib.*

12. Where a grant was made of a right to construct and use fifty machines within certain localities, reserving to the grantor the right to construct, and to license others to construct, but not to use them therein, *it was held*, that the grant was of an exclusive right under the statute of 1836 in regard to patents, and that suits were to be brought in the name of the assignees, even though agreed to be at the expense of the grantor. *Ib.*

13. Where a patent has been granted, and there has been an exclusive possession of some duration under a patent, an injunction will be granted, without obliging the patentee previously to establish the validity of his patent by an action at law. But it is otherwise, if the patent be recent, and the injunction be resisted on the ground that the patent ought not to have been granted, or is imperfectly stated in the specification. *Ib.*

14. *Held*, that the patent in the present case was, upon the true interpretation of the specification, a patent for an improved machine. *Ib.*

15. Where a bill in equity was brought for an injunction against the defendants, to restrain them from using and selling a planing machine, constructed according to the specification in the plaintiff's patent, *It was held*, that, after the lapse of time which had occurred since the patent was granted, taken together with the other circumstances of the case, the affidavit of a single witness was not sufficient to outweigh the oath of the patentee, and the general presumption arising from the grant of the letters patent. *Woodworth* v. *Sherman*, 171.

16. The patent act of 1836 authorizes the granting of an extended term of a patent to an administrator, as well as to the patentee. *Ib.*

17. The assignee or grantee, under the original patent, does not acquire any right under the extended patent, unless such right be expressly conveyed to him by the patentee. *Ib.*

18. In this circuit the practice in patent cases has not been to require the plaintiff to give security for costs. *Ib.*

19. To entitle a person to claim the benefit of the seventh section of the patent act of 1839, ch. 88, he must be a person, who is a purchaser or who has used the patented invention before the patent was issued, by a license or grant or by the consent of the inventor, and not be a purchaser under a mere wrongdoer. *Pearson* v. *The Eagle Screw Co.* 402.

20. The case of *McClurg* v. *Kingsland*, (1 How. Sup. Ct. R. 202,) commented on and explained. *Ib.*

21. In causes for violation of a patent, the jury are at liberty to give such reasonable damages as shall vindicate the the rights of the patentee, and shall indemnify him for all expenditures necessarily accrued in the suit beyond what the taxable costs will repay. *Ib.*

PERIL OF THE SEAS.

Embezzlement is not a peril of the seas by the maritime law of this country; and theft or robbery is a peril of the seas only where it is a piracy on the high seas; but not where it is committed by persons coming to the ship when she is not on the high seas, or by persons on board. *King* v. *Shepherd*, 349.

POSTMASTER.

A postmaster is not bound to keep the moneys received for postage distinct from his own, nor to deposit it specifically in the name of the United States. *Tafton* v. *Bright*, 646.

SALE.

1. Where a purchaser buys on faith of a false representation by the seller, touching the essence of the contract, the sale will be set aside in equity, whether the misrepresentation were the result of fraud or of mistake. *Doggett* v. *Emerson*, 700.

2. A seller is bound to act with the utmost good faith, and if he mislead the purchaser by a false or mistaken statement as to any one essential circumstance, the sale is voidable. *Ib.*

3. Where a sale of certain timber lands was made in 1835, and the present

bill was brought in 1841 to set it aside, for mistake and fraud, and it appeared that false statements had been made by the seller, going to the essence of the bargain, on which the buyer had relied, and that knowledge of the fraud had not before come to the knowledge of the plaintiff; *It was held*, that the lapse of time was not, under the circumstances, a bar to the suit. *Ib.*

4. Where a paper was executed by A., as agent of the defendant, to D., giving D. the refusal of certain timber lands, for a certain time, at a certain price, and D. subsequently sold the land to the plaintiff, and the deed of conveyance to the plaintiff was made by A. directly, and not through D., and the plaintiff brought an action against A. and his principals, to set aside the sale on account of fraudulent misrepresentations by D., *It was held*, that the circumstances created a legal presumption that D. was acting as agent of A. and his principals, and that as A., by his conduct, subsequently ratified the sale, he and his principals were responsible for all D.'s misrepresentations made at the sale, whether D. exceeded his authority or not, inasmuch as they could not ratify a portion of the transaction and reject the rest. *Ib.*

5. Where, in a treaty for the sale of property, the vendor makes material misrepresentations, by which the purchaser, having no knowledge or means of knowledge in relation thereto, is actually deceived to his injury, a court of equity will rescind the contract in pursuance thereof, although it do not contain the misrepresentations, and it matters not, in such a case, whether the misrepresentations be the result of mistake or fraud. *Hough* v. *Richardson*, 659.

6. But where a purchaser relies on his own judgment, uninfluenced by any misrepresentations, and has full means of knowledge within his reach, a court of equity will not relieve him from his bargain. *Ib.*

7. When C. gave a certificate, that certain lands, which he had "partially explored," contained, "as far as my knowledge extends," a certain average of timber, and it appeared that the purchasers, to whom it was given, had as full means of knowledge as C., *It was held*, that they were not entitled to place implicit reliance thereon, and make it the basis of their contract; but that they should have investigated the grounds of the opinion therein expressed, and the extent of the exploration by C. *Ib.*

8. No purchaser is at liberty to remain intentionally ignorant of facts relating to his purchase within his reach, and then claim protection as an innocent purchaser. *Jenkins* v. *Eldredge*, 183.

STATUTE OF FRAUDS.

1. The statute of frauds is never allowed as a protection to frauds, or as a means of seducing the unwary into false confidence to their injury. *Jenkins* v. *Eldredge*, 184.

2. The doctrine that the statute of frauds applies to cases of agreements in consideration of marriage, where reliance is placed solely on the honor, word or promise of the party, is restricted to cases of marriage, and does not apply to cases where there has been a part-performance on the other side. *Ib.*

3. *Quære*, Whether the doctrine as to cases of marriage is well-founded. *Ib.*

4. Where the evidence showed that the defendant agreed to reduce the trust to writing, or to keep a private memorandum thereof, *it was held*, that this took it out of the statute, and showed that it was not a mere subsequent promise, but a part of the original agreement. *Ib.*

5. The doctrine of *Taylor* v. *Sutton*, (2 Sumner R. 298,) affirmed. *Ib.*

SURETY.

A surety can require the creditor to proceed first against the principal only when his suretyship appears on the face of the instrument, or when he offers to indemnify the creditor in his proceedings against the principal, and to pay whatever the principal fails to pay. *In the matter of Babcock*, 393.

SHIPPING.

1. The tackle, apparel and furniture of a foreign vessel wrecked upon our shore, and landed and sold separate from the hull, are not goods, wares and merchandise imported into the United States within the meaning of the revenue laws. *The Gertrude*, 68.

2. Goods taken and landed from a foreign vessel wrecked upon the coast, are not subjected to forfeiture under the fifth section of the act of March 2, 1799,

ch. 122, by being landed without a permit from the collector. *Ib.*

3. The schooner Annawan, bound from Malaga to Philadelphia, and owned in Massachusetts, having on board a cargo of fruit and wine, was obliged, from stress of weather, to put into Bermuda, where she was surveyed and repaired, and the damaged part of the cargo was sold, and the proceeds appropriated to the payment of the repairs, and the balance required for the repairs was raised on a bottomry bond, on the vessel, freight and cargo. The vessel then proceeded with the remainder of the cargo, and some copper on freight, and was again forced, by stress of weather, to put back to Bermuda, where, after a survey, the captain sold the vessel and the whole cargo, and with the proceeds paid the whole money on the bottomry bond, and detained the balance. The vessel was subsequently repaired, and brought to Philadelphia, with the sound part of the cargo. The present action is brought by the shippers, to recover the whole cargo. *It was held*,

1st. That the responsibility of the owners of the schooner is governed by the laws of Massachusetts, where the owners reside, and not of Pennsylvania, or Spain.

2d. That the defendants are liable personally to the plaintiffs, for the moneys of the shipper appropriated by the master towards the repairs of the ship, before the bottomry bond was given.

3d. That the defendants are not liable to the plaintiffs for the moneys subsequently applied by the master to the payment of the bottomry bond; nor for the wrongful act of the master in selling the sound part of the cargo.

4th. That the sale of the perishing articles, and the appropriation of the proceeds thereof to the repairs of the ship, was justifiable; but that the sale of the sound part of the cargo was unjustifiable, and that the master is responsible for the proceeds of such sale to the shippers.

5th. That no general average is now, in this case, due to the defendants; but the general average should be applied *pro tanto* as property of the ship-owners, in relief of the owners of the cargo, towards the bottomry bond. *Pope* v. *Nickerson*, 466.

4. By the laws of Spain, and of Massachusetts, the liability of the owners for the acts of the master is limited to the value of the vessel and her freight, and does not include a general liability to the full extent of the loss or damage to the shippers, as by the laws of Pennsylvania. *Ib.*

5. The master of a vessel has no power to bind the owners beyond the authority given to him by them, and the extent of that authority must be limited to their express or implied instructions, or to the law of the country to which the ship belongs, and in which they reside. *Ib.*

6. The validity, nature, and interpretation of contracts, is governed by the law of the place where they are to be performed; unless they are void by the law of the place where they are made. *Ib.*

7. Bottomry bonds are not to be construed strictly, but liberally, so as to carry into effect the intention of the parties. *Ib.*

8. The holder of a bottomry bond will not lose his money, where the non-performance of the voyage has not been occasioned by the enumerated perils, but has arisen from the fault or misconduct of the master or owner. *Ib.*

9. In cases of bottomry, a loss, not strictly total, cannot be turned into a technical total loss, by abandonment, so as to excuse the borrower from payment, even although the expense of repairing the ship exceeds her value. *Ib.*

10. The master of a vessel has a right to sell a part of the cargo to make repairs, or to furnish necessaries for the completion of the voyage, and, by the general law in England and America, the owner would be responsible therefor to the shipper for the full amount, whatever it might be. *It seems* that this rule would only apply in case the vessel arrived at her port of destination, and not otherwise. *Ib.*

11. The only operation of the statute in Massachusetts on this rule, is to restrict the liability of the owners to the value of the ship and freight. But the shippers have a personal claim, and a lien therefor on the ship and freight, which attaches the moment the goods are appropriated. *Ib.*

Notes of Leading Cases.

From the London Law Magazine, for May, 1847.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS.

In the late cases of *Coxhead* v. *Richards*, (2 Com. B. 569); *Blackham* v. *Pugh*, (Ib. 611); *Bennett* v. *Deacon*, (Ib. 628); *Griffiths* v. *Lewis*, (7 Q. B. 61); *Wilson* v. *Robinson*, (Ib. 68), questions arose, whether communications charged to be libellous or slanderous came within the class of communications privileged by the occasion on which they were made; and the cases in the court of common pleas gave rise to a division of opinion amongst the judges, and consequently to an elaborate examination of the subject. In principle, however, no substantial difference of opinion appears; it is the application of settled principles which has occasioned all the difficulty. In *Coxhead* v. *Richards*, the communication to the owner of a ship, by a stranger, of a letter written to him by the mate, and containing charges of gross misconduct against the captain, was held by Tindal, C. J. and Erle, J., to be privileged; by Coltman, J. and Cresswell, J., to be not privileged; and the same judges respectively retained their opinions in *Bennett* v. *Deacon*, where the question was whether a caution, bonâ fide given to a tradesman, without any inquiry on his part, not to trust another, falls within the exception as to privileged communications; but it was not disputed that the general rule was accurately laid down by Parke, B., in *Toogood* v. *Spyring*, (1 Cr. M. & R. 181,) thus: — "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander); and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence, depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." Upon the authority of that rule, the court of common pleas decided the case of *Blackham* v. *Pugh;* in which they held, Cresswell, J. still dissenting, a communication made under the following circumstances to be privileged, as being made by the defendant "in a matter where his interest was concerned." The plaintiff being indebted to the defendant upon an unexpired credit, employed a third person to sell his goods by auction, and absented himself under circumstances sufficient to induce the defendant to believe that he had committed an act of bankruptcy. Whereupon the defendant gave the auctioneer notice not to pay the proceeds of the sale to the plaintiff, "he having committed an act of bankruptcy;" which was the libel charged in the declaration. All these cases are exceedingly valuable, as illustrations of the rule above laid down. The two cases in the court of Queen's Bench, remain to be noticed. In the former of them it was held to give the defendant no privilege that the slanderous words were spoken by him in answer to a question from the plaintiff, whether the defendant had accused her of using false weights, that question having been occasioned by a former statement of the defendant himself. In

the latter, the defendant had pleaded a justification that the plaintiff had been guilty of embezzlement, but at the trial offered no evidence in support of that plea, resting his defence upon the ground that the libel was a privileged communication. The plaintiff sought to avail himself of the fact that the defendant had put upon the record a reiteration of the charge, but admitted its falsehood at the trial, as evidence of malice; and cited *Warwick* v. *Foulkes*, 12 M. & W. 507, where in trespass for false imprisonment the jury were allowed to consider that faat in estimating the damages, Lord Abinger, C. B., saying that it was "evidence of malice;" but the court thought the cases different, and that he could not do so.

AN ATTORNEY CANNOT ACT AS ADVOCATE AND WITNESS IN THE SAME CAUSE.

The two decisions of *Stones* v. *Byron*, (1 B. C. R. 248); *Dunn* v. *Packwood*, (1 B. C. R. 312,) are just now important, when the new county courts may very likely give rise to many attempts to encroach upon the principles which should govern all proceedings in courts of justice. In the former case the verdict was set aside, because the attorney for the plaintiff had, after stating the case and examining the witnesses, and making a speech in reply, been examined as a witness to rebut the case set up by the defendant. In the latter the attorney had merely stated the case, and been examined as a witness. Patteson, J. and Erle, J. respectively set aside these verdicts, thus establishing the broad principle that a man ought not to be advocate and witness in the same cause. In the argument on the first case, a very apt illustration of the evil was drawn from the trial of Sir Thomas More, which Lord Campbell (Lives of the Chancellors, i., 580) thus describes: —"The jury, biased as they were, seeing that if they credited all the evidence, there was not the shadow of a case against the prisoner, were about to acquit him. The judges were in dismay, —the attorney-general stood aghast, when Mr. Solicitor, to his eternal disgrace, and to the eternal disgrace of the court who permitted such an outrage on decency, left the bar, and presented himself as a witness for the crown. Being sworn, he detailed the *confidential conversation* he had had with the prisoner in the Tower." The result, we all know, was a judicial murder of the deepest atrocity.

THE KEEPER OF ANY MISCHIEVOUS ANIMAL IS LIABLE FOR ANY INJURY INFLICTED BY SUCH ANIMAL, EVEN WITHOUT ANY DIRECT NEGLIGENCE ON HIS PART.

The two cases of *May et Ux.* v. *Burdett*, (16 L. J. Q. B. 64); *Jackson* v. *Smithson*, (15 L. J. Exch. 331,) occuring within a short time of each other, will probably settle the law as to the rights and duties of persons who keep either wild animals in a state of confinement, or domestic animals of a known vicious and mischievous disposition. The first was an action for injury done by a monkey, and the second for injury done by a ram. The declaration in the one case alleged, that the defendant knew that the monkey was of a mischievous and ferocious nature; in the other, that the ram "was prone and used to attack, butt and injure mankind." In both a motion was made to arrest the judgment for want of any averment that the defendant had been guilty of negligence. The judges of both courts, however, were unanimous that this was unnecessary, for the principle of our law is, that he who keeps an animal, dangerous to his neighbor, either because it is *feræ naturæ*, or because it has ceased to be tame and become fierce, is bound to keep it securely at his peril; and if any injury is done by it, negligence in the owner is presumed to have been the cause of such injury, for which he is liable in damages. There is negligence in the mere fact of keeping it after notice of its propensities; and the court of Queen's Bench seemed almost to doubt whether the owner would not be responsible even if the injury was wholly occasioned by the wilfulness of the plaintiff after warning. This, however, we should think, would never be seriously maintained to the full extent, although it may need very strong evidence to get rid of the primâ facie liability. For instance, in *Smith* v. *Pelah*, (2 Stra. 1264,) Lee, C. J., ruled that it made no difference in the case of a savage dog that the person bit had trodden on the dog's toes.

Notices of New Books.

REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF CHANCERY OF THE STATE OF NEW YORK, BEFORE THE HON. LEWIS H. SANDFORD, ASSISTANT VICE CHANCELLOR OF THE FIRST CIRCUIT. Vols. I. and II. New York: Published by Gould, Banks & Co., Law Booksellers, 144 Nassau street, and by William and A. Gould & Co., 104 State street, Albany. 1846.

THE office held by Mr. Sandford was created in 1839, in order to relieve the docket of equity cases, which had got to be greatly in arrear. The principal duty imposed on the incumbent, was the hearing of those equity cases, which were to be decided after evidence had been taken, the decision, where there was a demurrer or a mere point of law to be decided, being generally retained by the chancellor and vice chancellor. The court is now abolished in the general obliteration of all equity courts in New York, and at the first thought, it would seem useless to publish reports of an inferior court of equity in a state which had just abolished all its courts of equity. But Mr. Sandford justly observes, in his preface to the second volume, that the change is one of form only, and that so far from doing away with equity *principles*, the union of the courts will inevitably lead to a much more extensive application of them. Cases in equity may become rare in New York, but decisions on the principles of equity will be much more frequent than before. The present volumes present the features which we should expect, when a judge reports his own decisions, and where the cases decided by him all belong to the class we have mentioned. The names of counsel are given but not their arguments; and there is so much of evidence stated and so much of the history of the case given, as to make the volumes of more interest, than the intrinsic importance of the cases to the equity lawyer would occasion. We are continually meeting with a case closely connected with public events, or which seems to make us acquainted with all the parties to it. The same observation occurs immediately on reading any book of *nisi prius* reports.

The opinions now given to the public in these volumes, reflect great credit on the learning and ability of the assistant vice chancellor. If he makes many weak or unsound decisions, he at least does not report them. Mr. Sandford has made an acceptable addition to any equity library. An occasional looseness of style may be observed. Thus—"the House of Lords *reversing Lord Northington*, decided" &c. But it may be easily pardoned as the opinion very ably (to carry out the expression) puts his Lordship *right side up again*. There are many very interesting cases in these volumes. We can only mention one or two. *Barry* v. *Merchants Exchange Insurance Co.* (Vol. I. p. 280) is very ably treated. In *Kniskern* v. *Lutheran Churches, &c.* (Vol. I., p. 439,) there is an elaborate discussion of the theological tenets of Lutheran churches. Cases requiring a profound knowledge of theological history are not uncommon in the New York courts of equity. An instance may be seen in *Gable* v. *Miller*, (10 Paige 627;) since reversed, we are happy to say, in 2 Denio. *Lynch* v. *Clark*, (Vol. I., p. 583) is an interesting case respecting alienage. In *Clark* v. *Ely*, (Vol. II., p. 166) the court held (adhering to the state cases,)

that a person taking a promissory note in *payment* of a preceding debt, but without giving up any of his securities therefor, is not a holder for a valuable consideration so as to take it free from prior equities. The doctrine sustained in *Coats* v. *Holbrook*, (Vol. II., p. 586) is very important to the mercantile and manufacturing interest, and throws an efficient shield over the right to one's own trade marks. In *De Kay* v. *Waddell*, (Vol. II. p. 494.) the court dissent from the views of Judge Story, in *Ex parte Foster*, (2 Story R. 131,) as to the operation of bankruptcy on attachments under mesne process, and take the same view which the courts in New Hampshire so ably maintained. *Non nostrum tantas componere lites.* Many others of the cases will well repay examination.

PUBLIC LAWS OF THE UNITED STATES OF AMERICA, PASSED AT THE SECOND SESSION OF THE TWENTY-NINTH CONGRESS; 1846–1847. Carefully collated with the Originals at Washington. Edited by GEORGE MINOT, Counsellor at Law. To be continued annually. Boston: Charles C. Little and James Brown. 1847.

This work is a continuation of the magnificent edition of the Laws of the United States, from the same publishers, "by authority of Congress." Messrs. Little & Brown announce that they intend to publish annually, and as soon after the close of each session of congress as they can, the Acts of that session, in a similar form and with a similar arrangement. The pamphlets will be paged consecutively, and, when enough have accumulated to make a volume, they will publish with the last one, a general index to the whole, so that any one purchasing the successive pamphlets, as they come out, can then have a complete volume without any additional expense, other than that of binding them together. The publishers also state, that they have procured a careful collation with the records at Washington, by an experienced reader, and have scrupulously followed the original. It is grateful to know that we are at length to have a handsome annual edition of the laws of the United States. Under the conscientious and careful editorship of Mr. Minot, it cannot fail to supplant entirely, in our profession at least, the shabby edition printed at Washington, and "published by authority." We notice, by the way, that *transient* newspapers are mentioned by Mr. Minot, in his index. What *is* a "transient newspaper," upon which we are informed in the index, that the postage is "to be prepaid!"

LETTERS ON THE PRESENT STATE OF LEGAL EDUCATION IN ENGLAND AND IRELAND, ADDRESSED TO GEORGE ALEXANDER HAMILTON, ESQ., MEMBER OF PARLIAMENT FOR THE UNIVERSITY OF DUBLIN. By HENRY HOLMES JOY, ESQ., Barrister at Law. Dublin: Hodges & Smith. London: A. Maxwell & Son, 1847. pp. 151.

This is a valuable and interesting publication, in which we had noted several passages for insertion in our own pages, but are obliged to omit them at present for want of room. Most honorable mention is made of the law school at Cambridge, and the labors of the late Judge Story and of Professor Greenleaf.

NEW BOOKS RECEIVED. Reports of Cases in Chancery, argued and determined in the Rolls Court, during the time of Lord Langdale, Master of the Rolls. By Charles Beavan, Esq., M. A., Barrister at Law. With notes and references to both English and American Decisions. By John A. Dunlap, Counsellor at Law. Vol. VII. 1843, 1844—7 and 8 Victoria. New York: Published by Banks, Gould & Co., Law Booksellers, No. 144 Nassau street; and by Gould, Banks & Gould, No. 104 State street, Albany. 1847.

The American Loyalists, or Biographical Sketches of Adherents to the British Crown, in the War of the American Revolution; Alphabetically arranged; with a preliminary historical essay. By Lorenzo Sabine. Boston: Charles C. Little and James Brown. 1847.

A Treatise on the Right of Property in Tide Waters and in the Soil and Shores thereof. By Joseph K. Angell. Second Edition, revised, corrected and much enlarged. Boston: Charles C. Little and James Brown. 1847.

Intelligence and Miscellany.

Lord Brougham. The last number of the London Law Magazine contains an article on modern orators, in which there is a ferocious attack on Lord Brougham, containing, however, the poor admission that he is ("unhappily") the first orator of the day. We copy a large portion of the remarks upon the English statesman, who is more generally known, perhaps, than any other, in our country.

And we now come to the man who seems more than any other of his contemporaries intended by Providence for the consolation of blockheads, and to justify that passion for mediocrity by which the inhabitants of this island are as much distinguished as a Frenchman is by his reverence for genius. Not that Lord Brougham is by any means the prodigy which at one time it was the fashion for terrified squires and liberal tradesmen in country towns to imagine, and which for a short time it suited the purpose of a triumphant party to hold up as the grand instrument of human regeneration—an error of which they have since had ample leisure to repent. Far otherwise. Nor does Lord Brougham, in his more sober moments, so consider himself. He knows better; he has had occasion to find that after all the world too knows better, and that his admirers, if he has any left, have either very shallow sense, or very deep hypocrisy. As a man of science his merits are well known. There is in the Edinburgh Review a paper written by Lord Brougham, containing a bitter attack on one of the first philosophers in England, who lived to see the discovery, for which he was treated by an unscrupulous sciolist as a quack and a mountebank, universally appreciated. For a time, however, the attack was successful. Dr. Young[1] was almost broken hearted; with all the modest simplicity of genius, he never retaliated on his presumptuous and unprovoked enemy; but left time to determine to whom the reproach of sciolist and vain pretender might most properly be applied. Time *has* decided; and Lord Brougham's article still remains a proof of good nature, candor, and scientific ability, to which few men of any age or country have it in their power to appeal. For the Society of Useful Knowledge Lord Brougham was good enough to compose part of a treatise on hydrostatics, so utterly erroneous, that it was called in and

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[1] In January, 1803, was published his (Lord Brougham's) critique on Dr. Young's Bakerian Lecture "On the Theory of Light and Colors," in which lecture the doctrine of undulations and the law of interferences was maintained. This critique was an uninterrupted strain of blame and rebuke. "This paper," the reviewer said, "contains nothing which deserves the name either of experiment or discovery." He charged the writer with "dangerous relaxations of the principles of physical logic." "We wish," he cried, "to recall philosophers to the strict and severe methods of investigation," describing them as those pointed out by Bacon, Newton, and the like. Finally, Dr. Young's speculations were spoken of as an hypothesis, which is a mere work of fancy; and the critic added, "We cannot conclude our review without entreating the attention of the Royal Society, which has admitted of late so many hasty and unsubstantial papers into its transactions;" which habit he urged them to reform. . . . . The reviewer showed ignorance as well as prejudice in the course of his remarks; and Young drew up an answer, which was ably written; but being published separately, had little circulation.—*Whewell's History of the Inductive Sciences*, vol. ii. p. 432.

cancelled. As a legislator, he is simply ridiculous. Eldon himself is a plummet over him. His attempts in that line, when backed by the whole power of the state, partly from precipitation, partly from ignorance, partly from that incapacity to go to the bottom of any subject, which seems to be a principle of his nature, have been, without exception, complete and ignominious failures. Witness his court of bankruptcy, which as established by him cost this country fifteen or twenty thousand pounds yearly, the principal business of which has been done for some years by Sir James Bruce, at odd hours taken from his duties as Vice Chancellor, with the greatest ease, to the perfect satisfaction of the public, and without the expense of one shilling to the country. Nothing, indeed, has made the reform of the law so difficult or delayed it so long as the prominent part which Lord Brougham has found it expedient to take among its supporters. He has attempted much, and done nothing. As a scholar in the ancient languages, his translation of Demosthenes, the work of years, is marked by signs of ignorance, which a schoolboy, to whom it had been set as a holiday's task, would probably have avoided; and he seldom quotes a line of Virgil, without falling into some error denoting that his acquaintance even with the Latin tongue is of the most superficial nature. His life of Voltaire is trite, insipid, and even weak; and in his life of Rousseau and criticism of his works, he actually omits, probably he never read them, the "Lettre à l'Archevêque de Paris," and the "Lettres de la Montagne," the most splendid examples, in the opinion of Villemain, of Rousseau's burning eloquence and consummate logical dexterity. As a metaphysician, for he has rushed "invitâ Minervâ" even upon that ground, it is difficult to understand how any man, in the habit of mixing at all with foreign society, can be so completely unconscious of what every student in Paris and on the other side of the Rhine is familiar with, so ignorant of the actual state and past history of that science as his writings prove him to be. To Roman and English law he is not indeed equally a stranger; for of the former, as his writings show, he has the very alphabet to learn, and with the simpler rudiments of English law, he certainly has, at the expense probably of many suitors, at length acquired a superficial knowledge. How then has it come to pass that this man was chancellor for a short time during the Whig administration, and that since his junction with the Tories — the Whigs having of course abandoned all their principles, and the Tories theirs also — for Lord Brougham assures us *he* has remained immovable, like the earth in the Ptolemaic theory — the Tories have thought it worth their while to repay his honest exertions in their behalf by an almost unlimited amount of Patronage? Are we to look for this secret influence in his high moral qualities? in his inflexible adherence to truth? in his purity of life? his disdain of the weapon with which, in the Italian poet's phrase, Judas jousted? in that steady friendship on which it appears that Horner, Macintosh and Sydney Smith, had so perfect a reliance? Alas, though we are far from denying that Lord Brougham possesses all these virtues, this is not the age when alone they raise a man to power. To what then does Lord Brougham owe whatever influence belongs, or ever has belonged to him? The answer brings us to our point; he *is* an orator. This faculty it is to which he owes his elevation. As a statesman, mixed up though he has been with the most important measures of the century, having no place at all — *οὐ πρῶτος, οὐ δεύτερος, οὐ τρίτος, οὐ τέταρτος, οὐ πέμπτος, οὐχ' ἕκτος, οὐχ' ὁποσοστοῦν*; — as a jurist, being without any the slightest approach to the faintest gleam of knowledge of the volumes in which the treasures of jurisprudence are deposited; — as a law reformer, having only a shadowy and confused notion of the principles on which law reform ought to proceed at all, and perfectly unable to apply that notion — ambiguous, vacillating, and obscure as it is — to the Augean heap of English jurisprudence; — as a friend, what Horner, Sydney Smith, Mackintosh, and many others (we know what we say) have found him — inaccurate to a degree, that makes it impossible to rely on any one statement, touching any given subject, that he makes either as an author or in his place in parliament — an intriguing adherent — a perfectly unsafe

counsellor — an historian without research, as he was a translator of Demosthenes without Greek — ready in a fit of candor to bow down before those to-day on whom he yesterday poured out the wildest and most extravagant invective — ready to assail from motives, if public, the least intelligible those with whom he long has acted — with an upstart's idolatry of rank — intoxicated to a ludicrous degree with the first symptom of what he mistook for court favor — unsound — capricious — interested — Lord Brougham is unhappily for this country the first[1] orator of his day. Not that his day is one of great orators — far from it. About the time of his first appearance in parliament, he himself, in a passage which he has not yet found an occasion directly to contradict, has asserted that it was the mediocrity of their talents, that with one or two exceptions had recommended ministers to the notice of the regent. The opposition was led by Mr. Ponsonby, a man entitled to respect for many valuable qualities, but without those conspicuous and brilliant talents, which have generally characterized a man entrusted with functions so important. In truth, for many years Mr. Canning was Lord Brougham's principal and only formidable antagonist. Of Mr. Canning's merits as an orator it is not our intention now to enter into any detailed criticism. With the exception of his speeches on the bullion question, and his vindication of the Lisbon mission, we think posterity will be at a loss to find in his speeches wherewithal to account for his unrivalled ascendency during so many years in the House of Commons. His wit was often flippant, his language, though polished, was too apparently studied and elaborate. His style elegant undoubtedly, was sometimes monotonous, and seldom was remarkable for vehemence and impetuosity. Demosthenes, said Cicero, "non tam vibrasset fulmina nisi numeris contorta ferrentur." And it is difficult to control a feeling of impatience at the labored antithesis, the schoolboy phraseology, the rather obvious quotations, the very inadequate arguments, and the not very refined jests, which are sometimes employed by Mr. Canning even when the mightiest interests of humanity are at stake. Besides, Mr. Canning was for a long time in a false position — "Cabined, cribbed, confined." Obliged to be the champion of a court which detested him, and of bigots whom he despised, it was long before his great powers had full scope and a proper sphere of action. With all these disadvantages, however, he was the decidedly successful antagonist of Lord Brougham, to whom in our opinion he was as an orator far inferior, in some measure no doubt because he was on the side which the prejudices of the majority led them to support, but also from Lord Brougham's excessive prolixity and utter want of judgment, of which we find in Romilly's memoirs the following curious instance.

"In the course of the debate upon the motion for the increase in the salary of Secretary to the Admiralty in time of peace, from 3000*l.* to 4000*l.* a year, Brougham, who supported the motion, made a violent attack upon the Regent, whom he described as devoted, in the recesses of his palace, to the most vicious pleasures, and callous to the distresses and sufferings of others, in terms which would not have been too strong to have described the latter days of Tiberius. Several persons who would have voted for the motion were so disgusted, that they went away without voting; and more, who wished for some tolerable pretext for not voting against ministers, and who on this occasion could not vote with them, availed themselves of this excuse, and went away too; and it is generally believed that, but for this speech of Brougham's, the ministers would have been again in a minority. If this had happened, many persons believe, or profess to believe, that the ministers would have been turned out. Poor Brougham is loaded with the reproaches of his friends; and many of them, who are most impatient to get into office, look upon him as the only cause that they are still destined to labor on in an unprofitable opposition."

It was to this want of judgment, and an unmanageable temper in Lord

[1] We mean in England; for it is generally allowed that M. Berryer is the first in Europe, with the exception perhaps of Dr. Lopez; but it is hard for a Spaniard to help being eloquent, as it is for an Englishman to express himself tolerably well.

Brougham, as well as to a thorough knowledge of his profession, of which Lord Brougham while at the bar knew inconceivably little, that Sir James Scarlett, the most successful of English advocates was indebted for his repeated triumphs over his precipitate and incautious adversary. For Lord Brougham, like many other men of great abilities, never ranked high in the list of successful advocates. His efforts were sometimes brilliant, — his cross-examinations often very effective; but where management and dexterity were requisite, — where the matter was doubtful, and the facts nicely poised, — where a slight ingredient would make the trembling scale preponderate, — where the case would not bear the broadcast fashion of dealing which suited his attainments and capacity, — where there was no fierce attack to be made upon a witness, little room for sarcasm, and no opportunity for declamation, Lord Brougham had as slender a chance of success as any junior in Westminster Hall for the first time robed in camlet, and frowning under that integument of horsehair, which, in the true spirit of John Bull, an English traveller assures us is a rampart of the constitution. It was like using the keys of a fortress to open a lady's dressing box. For ordinary purposes inferior men were preferable. The penknife cut on this side of the page and the other, spoiling the book, which the paperknife opened with perfect ease. The speech on the Durham clergy, awful as its sarcasm in some parts was, ensured a verdict against his client, who ought perhaps to have been acquitted. Of that on Queen Caroline, — admirable in most parts, judicious in some, powerful in all, — it should be remembered that it was the very case an advocate would select: that it contained every ingredient to provoke the scorn of the wise, to rouse the indignation of the just, to move the pity of the generous. Hatred of oppression is THE English virtue. It required no skill to prove the base motives and infamy of the witnesses by whom the bill was supported; no eloquence beyond the mere statement of facts was necessary to enkindle the sympathies of gentlemen in favor of a guilty, no doubt, but an outraged woman, — young, gifted, and magnanimous, — married with the vilest objects by the most contemptible of men, — cast off by him without even a decent pretext, when those purposes were answered, — held up in a strange land by her own husband as a jest to the minions, satellites and mistresses with whom he herded, loathed by his jaded lust, and persecuted by his more than woman's hate.

A LETTER FROM TENNESSEE. We believe that we shall be pardoned for printing the following letter from Judge Green, notwithstanding the compliment at the close of it. As an offset we can publish some of the letters in our possession, which are not so flattering to the character of the Law Reporter:

Mr. Editor, — Having read the "Law Reporter" for May, in which the question is discussed how far insane persons are responsible for acts done by them, I cannot withhold the expression of my entire approbation of the views therein expressed. I have long been dissatisfied with the answers given by the judges, to the questions propounded by the house of lords, while McNaughton's case was pending. Unless you assume that an insane man is bound to reason correctly upon a given hypothesis, the judges are certainly in error.

Baker, who was executed in Kentucky, a year ago, for the murder of Bates, labored under the delusion that Bates was in the habit of committing adultery with his (Baker's) wife. The judge who tried the case, and the governor who refused the pardon, were of opinion that he should be held responsible as though he were sane, and the matter in relation to which his delusion existed, were real. This opinion requires that the insane man should not only know that the *law* did not authorize an injured husband to slay the adulterer, but that he should reason correctly as to all his responsibilities in the case, legal and moral, and should have just views of his own rights and duties, as the injured party. But to require this in a person acknowledged to be insane, is manifestly absured. It is to disregard all the lessons of experience afforded by cases of insanity.

I think that when once the fact of insanity has been established, the law should regard the party as an irresponsible agent.

In the case of *Alston* v. *Boyd*, (6 Hump. Ten. Rep.) I held, that a contract of sale was not obligatory, on a party proved to have been laboring under various delusions, although it was proved he understood the value of property, and was hard to deal with.

The enlightened investigations, from time to time, in the "Law Reporter," of several leading principles of the science of law, I regard as highly interesting, and calculated to benefit the profession.

I am, &c.,

NATHAN GREEN.

Winchester, Tenn., 21st May, 1847.

THE ELECTION IN NEW YORK. The result of the late judicial election in New York, has been so generally published in the newspapers, that it hardly seems necessary for us to take up much space in announcing it here. In general, we believe the democratic ticket prevailed. We are not sufficiently acquainted with many of the gentlemen elected to speak of their qualifications; but we are sure that some of them are men of distinguished ability, who will do honor to the position in which they are placed. A proposition was made by the whig convention to the democratic, to unite, "in order to form such a union ticket for the court of appeals, as may be satisfactory to the good men of all parties." This was declined by the democratic convention, on a report by a committee, of which Mr. Theodore Sedgwick was chairman.

Hotch-Pot.

It seemeth that this word hotch-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

In the edition of the laws of the United States, printed at Washington, and "published by authority," there is an error of punctuation, which affects the sense of an important provision respecting the postage on newspapers. It is printed and punctuated as follows: "and all newspapers conveyed in the mail shall be subject to postage, except those sent by way of exchange between the publishers of newspapers, and except those franked by persons enjoying the franking privilege, and newspapers not sent from the office of publication; and all handbills or circulars, printed or lithographed, not exceeding one sheet, shall be subject to three cents postage each, to be paid when deposited in any post-office to be conveyed in the mail." From the peculiar phraseology and punctuation of this sentence, the meaning would seem to be, that "newspapers not sent from the office of publication" are "excepted" *from paying any postage whatever*. But in Little & Brown's edition of the laws, which is carefully collated with the rolls at Washington, a semi-colon is placed after the word "privilege," and a comma after "publication," which makes quite another affair of the provision, and sanctions the construction adopted by the department. It may be said that the first-mentioned construction renders the provision an absurd one; but we submit that it would not be more so than some others in the law as it is now administered. . . . . Since the foregoing was written, we have seen in the Washington Union, newspaper, a copy of the section referred to above, in which the punctuation is similar to that in the Boston edition. The official printer, at Washington, would do well to employ a proof-reader who will "follow copy."

A writer in a recent number of the Boston Post, is annoyed at the paragraph in our last number respecting the election of judges in New York, and "airs his vocabulary," at our expense, in a column of remarks. "We cannot find language *becoming to use*," he says, "that will sufficiently express our contempt of such sentiments uttered by the legal profession." His want of success, in this particular, is quite apparent from the whole article, unless it is shown in the use of such terms as "learned dyspeptics," "bigoted," "tory," "rabid exasperation," "petty insolence," "insolent superiority," &c. &c. We enter into no discussion with such writers as this, because it is a matter of entire indifference to us whether they like our sentiments or not.

One of the sheriffs of London has stated that in his experience, six persons, in the space of nine months, who were capitally convicted at the Old Bailey, and who were left for execution, were saved from death in consequence of investigations which proved that the convictions were improper.

Sir George Stephen says the number of practising solicitors and attorneys is so great in England, that as far as his acquaintance in his profession enables him to speak, not more than one-third are earning such an income by their profession, as will enable them to maintain themselves and their families in respectability.

C. L. Woodbury and George Minot, of Boston, have in preparation a volume of reports of cases decided in the circuit court of the United States for the first circuit. It is now in press.

There are said to be not less than seven hundred members at the Irish bar, and not less than sixteen hundred licensed attorneys.

The fifth of Howard's Supreme Court Reports is printed.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Atwood, Alfred,	Petersham,	Farmer,	May 28,	Walter A. Bryant.
Austin, Milton,	Boston,	Trader,	" 27,	Bradford Sumner.
Baker, Bezaliel S.	West Boylston,	Stone Mason,	" 17,	Isaac Davis.
Barber, Josiah,	Worcester,	Blacksmith,	" 24,	Henry Chapin.
Bardwell, Horatio R.	Windsor,	Farmer,	" 5,	Parker L. Hall.
Barnes, Elisha J.	Hingham,	Laborer,	" 22,	Ebenezer T Fogg.
Batchelder, William S.	Methuen,	Innholder,	" 14,	David Roberts.
Bills, Shubael,	Roxbury,	Yeoman,	" 6,	D. A. Simmons.
Bixby, Montgomery,	Boston,	Shoe & Leath. Deal-	" 20,	Bradford Sumner.
Blake, Leander,	Chelsea,	Laborer, [er,	" 19,	George S. Hillard.
Bruce, George W.	Boston,	Blacksmith,	April 29,	George S. Hillard.
Bumpus, Morris,	New Bedford,	Mariner,	May 15,	Oliver Prescott.
Burrill, Charles E.	Lynn,	Shoe Manufacturer,	" 7,	John G. King.
Cadmus, William H.	Boston,	Hairdresser,	" 7,	Bradford Sumner.
Clapp, Shepherd W. et al.	New Bedford,	Tailor,	" 25,	Oliver Prescott.
Clough, Jonathan C.	Boston,	Innkeeper,	" 16,	Bradford Sumner.
Conway, William,	Brookline,	Painter & Glazier,	" 19,	Sherman Leland.
Davis, Charles H.	Roxbury,	Trader,	" 26,	Ellis Gray Loring.
Dennis, Donivan,	Rochester,	Laborer,	" 14,	Zechariah Eddy.
Dewing, William,	Needham,	Paper Manufacturer,	" 19,	Sherman Leland.
Douglass, Noah,	New Bedford,	Trader,	" 17,	Oliver Prescott.
Emerson, Enoch,	Somerville,	Blacksmith,	" 29,	Bradford Sumner.
Felch, Hiram E.	Boston,	Printer,	" 5,	Willard Phillips.
Fish, Ansel H.	Charlestown,	Carpenter,	" 24,	George W. Warren.
Fish, Job W. et al.	New Bedford,	Tailor,	" 25,	Oliver Prescott.
Field, Ansel S.	Dedham,	Stone Cutter,	" 13,	David A. Simmons.
Fletcher, Daniel,	Acton,	Stone Mason,	" 5,	Nathan Brooks.
Gardner, Charles,	Salem,	Tailor,	" 6,	John G. King.
Gunnison, H. A.	Boston,	Gentlewoman,	" 11,	Bradford Sumner.
Guy, Henry R.	Boston,	Engineer,	" 13,	Willard Phillips.
Hall, Joseph P.	Medford,	Trader,	" 17,	George W. Warren.
Hosmer, Luther,	Concord,	Restorator,	" 27,	Nathan Brooks.
Howard, Ezra,	Dedham,	Shoemaker,	" 14,	D. A. Simmons.
Howe, Israel G.	Westboro',	Shoemaker,	" 13,	Henry Chapin.
Hunt, William,	Boston,	Housewright,	" 19,	Bradford Sumner.
Kilgore, Jervis S.	Ware,	House Carpenter,	June 3,	Laban Marcy.
Kimball, John S.	Salisbury,	Cordwainer,	May 22,	Ebenezer Moseley.
King, Samuel M.	Boston,	Clerk,	" 14,	Ellis Gray Loring.
Knapp, Daniel P.	Ware,	Harness Maker,	June 3,	Laban Marcy.
Littlefield, Aaron,	Randolph,	Bootmaker,	May 10,	Aaron Prescott.
Mecum, George,	Boston,	Silversmith,	" 24,	Bradford Sumner.
Mitchell, Sylvanus L.	East Bridgewater,	Trader,	" 10,	Welcome Young.
Nichols, James,	Boston,	Grocer,	" 14,	Bradford Sumner.
Oakes, James,	Boston,	Merchant,	" 15,	Bradford Sumner.
O'Neill, Denis,	Sandwich,	Glassblower, [er,	April 10,	Nymphas Marston.
Osgood, Mary,	Charlestown,	Board'g House Keep-	May 10,	George W. Warren.
Pitman, Nicholas,	Marblehead,	Shoe Manufacturer,	" 8,	John G. King.
Pomroy, Samuel,	Boston,	Grocer,	" 14,	Bradford Sumner.
Pray, Edmund,	Brookline,	Carpenter,	" 22,	Sherman Leland.
Ransom, John G.	Boston,	Junk Dealer,	" 12,	Bradford Sumner.
Remington, David G.	New Bedford,	Cooper,	" 10,	Oliver Prescott.
Richards, Norman P.	Boston,	Gentleman,	" 1,	Ellis Gray Loring.
Roberts, Andrew J.	Boston,	Gentleman,	" 11,	Ellis Gray Loring.
Sanborn, John E.	Boston,	Teamster,	" 5,	Bradford Sumner.
Sinclair, William R.	Roxbury,	Carpenter,	" 6,	Sherman Leland.
Skimmin, William, Jr.	Boston,	Merchant,	" 31,	Bradford Sumner.
Slocumb, Benjamin F.	Cambridge,	Trader,	" 17,	George W. Warren.
Smith, Charles W. et al.	Boston,	Merchant,	" 25,	George S. Hillard.
Stickney, Alfred J.	Georgetown,	Cordwainer,	" 6,	Ebenezer Moseley.
Stockbridge, Wales R.	Boston,	Trader,	" 27,	Bradford Sumner.
Sumner, Wm. Fisher,	Foxboro',	Yeoman,	" 6,	Sherman Leland.
Taft, Moses,	Webster,	House Carpenter,	" 3,	Isaac Davis.
Tolman, Joseph A.	Boston,	Merchant,	" 19,	Bradford Sumner.
Townsend, Henry B.	Boston,	Merchant,	" 25,	George S. Hillard.
Tracy, Charles W.	Milton,	Baker,	" 22,	Sherman Leland.
Wade, Charles,	Boston,	Coal Dealer,	" 25,	Bradford Sumner.
Wady, Ira S.	New Bedford,	Laborer,	" 6,	Oliver Prescott.
Walker, Seth C.	Boston,	Merchant,	" 17,	George S. Hillard.
Weeks, Prince,	New Bedford,	Carpenter,	" 14,	Oliver Prescott.
Wilkinson, Levi M.	Boston,	Teamster,	" 3,	Bradford Sumner.
Woodman, Henry W.	Georgetown,	Editor,	" 20,	Ebenezer Moseley.
Wrisley, Charles E.	Quincy,	Stone Cutter,	" 6,	Sherman Leland.